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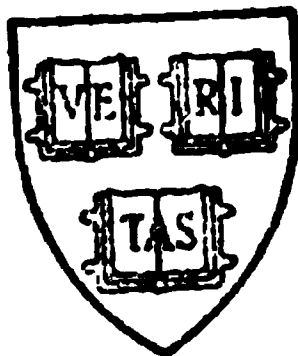
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VOL. 48—INDIANA REPORTS.

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VOLUME XLII.

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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
WITH TABLES OF THE CASES REPORTED AND CASES CITED
AND AN INDEX.

BY JAMES B. BLACK,
OFFICIAL REPORTER.

VOL. XLII.

CONTAINING CASES DECIDED AT THE MAY TERM, 1873.

¶

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OF THE
SUPREME COURT OF JUDICATURE

DURING THE TIME OF THESE REPORTS.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, MAY TERM, 1873, IN THE FIFTY-SEVENTH
YEAR OF THE STATE.

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| 137 | 671 |

MAGUIRE ET AL. v. SMOCK ET AL.

CITY.—Common Council.—Petitioners for Street Improvement.—Good Faith of Petitioners.—The common council of a city have a right to believe that every property owner petitioning for the improvement of a street does so in good faith, and not under a contract by which he is to be relieved of the whole or any part of his share of the cost of the improvement, whilst he is seeking to have others taxed for the whole amount of their shares under the law.

SAME.—Any agreement or combination among parties petitioning for the improvement of a street, by which a few individuals, desirous of causing the improvement to be made, procure the signatures of others to the petition by paying, or agreeing to pay, a consideration therefor, either directly or indirectly, is a fraud on the law and contrary to public policy.

SAME.—In an action upon an agreement to pay a consideration to procure the signatures of property owners to a petition for the improvement of a street, for those whose names were thus procured to say that they were not opposed to the improvement "in itself considered," but that they did not feel pecuniarily able to bear the expense, and that they accepted the agreement in good faith, and without fraud, will not render the agreement valid, or enable them to enforce it.

APPEAL from the Marion Superior Court.

OSBORN, C. J.—The appellants instituted an action against.
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the appellees upon a written instrument, of which the following is a copy:

“INDIANAPOLIS, April 8th, 1870.

“We, the undersigned, guarantee unto Douglass Maguire and William J. Gillespie the sum of eight hundred dollars, on the assessment for improving Delaware street with the Nicholson pavement in front of their property on said street, provided they petition the city council of Indianapolis for said improvement.

“WM. C. SMOCK,
“D. H. WILES,
“J. T. WRIGHT.”

It is alleged in the complaint that the appellants did petition the city council for the improvement, and did become liable to pay a large sum for and upon the assessments upon their property for the improvement, and in a much larger sum than eight hundred dollars; that they have been compelled to pay, and have paid, the assessments upon their property for such improvement, an amount exceeding eight hundred dollars; that the defendants, the appellees, were then the owners of property bordering on said street, and were very desirous to obtain the construction of the improvement, for the purpose of enhancing the value of their property bordering thereon; that they made the contract in consideration of the benefits they would receive from the construction of the improvement; that they afterward paid all of the eight hundred dollars, except the sum of two hundred and sixteen dollars and sixty-six cents, which remains unpaid.

A demurrer was filed to the complaint, which was overruled. The appellants answered, alleging, amongst other things, that at the time of the execution of the written instrument sued on, a question was pending before the common council of Indianapolis as to whether the improvement contemplated in the writing should be made at the expense of the city and numerous owners of real estate on and along the line of the street between the points named; that the plaintiffs were owners of real estate on and along the street

between those points, and as such, had signed a remonstrance with other owners against the contemplated improvement; that afterward they corruptly and fraudulently entered into the agreement mentioned in the complaint, and petitioned the council to make the improvement; that the council caused the work to be done; and that the cost of it was assessed against the property bordering on the street, and paid by the owners, stating the sums paid by the several remonstrators.

A demurrer to the answer was overruled, and a reply filed admitting that they had signed a remonstrance as alleged in the answer, but averring that it was done, "not because they were opposed to the work in itself considered, but because they did not feel pecuniarily able to bear the expense that would be assessed against their property by reason of said improvement;" that the defendants came to them, without solicitation or inducement on their part, and proposed to enter into, and executed, the contract, which they accepted, and afterward signed the petition in perfect good faith, and without any desire or design whatever to corruptly or fraudulently influence the said common council, or any officer or person connected with the government of the city; that after receiving the contract, they were willing and anxious to have the improvement made, and were willing to pay all over the said sum of eight hundred dollars which would be assessed against their property, and by reason thereof signed the petition for the purpose of procuring the improvement to be made.

On motion of the appellees, a part of the reply was stricken out. The motion was to strike out all between the first word on the second page and the second word on line thirteen of said second page, all on page one, and beginning at the second word of line twenty-two on said second page, and strike out all the remainder of the reply. We have no means of determining what was included in the motion. The record does not show how the reply was paged and lined. We must take the reply as we find it in the record,

presuming that the clerk has omitted what was stricken out.

A demurrer was filed and sustained to the reply. The appellants refusing to amend or reply further, final judgment was rendered against them for costs. Proper exceptions were taken by the parties to the several rulings of the court.

An appeal was taken to the general term, where the judgment of special term was affirmed. The appellants seek to reverse the judgment for the alleged errors of the court in overruling the demurrer to the answer, in sustaining the motion to strike out a part of the reply, and in sustaining the demurrer to the reply.

The law authorized the common council to cause the improvement contemplated in the contract to be made, on the petition of the resident owners of two-thirds of the whole line of lots, or parts of lots, bordering on the street, or part of street, sought to be improved at the expense of the owners of lots bordering on the street, or the part thereof to be improved, except so much thereof as is occupied by public grounds of the city bordering thereon, and the crossings of streets and alleys, which were chargeable to the city.

The council possessed no authority to cause the improvement to be done without the petition, except with the concurrence of two-thirds of the members thereof. With such concurrence, and without any petition, the council might order or cause the improvement to be made, and either charge and cause the expense thereof to be assessed and collected as provided when petition is filed, or if deemed just and right by the common council, cause the expense, or any part thereof, to be paid out of the general revenue of the city. 3 Ind. Stat. 98 to 104, secs. 68 to 71.

We are not informed by the pleadings whether the petition contained the number of names of resident owners requisite to authorize the common council to cause the improvement to be made by a majority vote or not. We are informed, however, that the question of making the improvement was pending before the common council; that the appellants and others had remonstrated against it, and

that it was important to overcome the opposition of the appellants and change them from remonstrators against, to petitioners for, the improvement, in order to control the action of the common council in favor of the work. We do not consider it necessary to decide whether the council were compelled to cause the work to be done on filing the petition, or whether it was optional with them to do it or not; nor whether the names of the appellants were necessary to make the requisite number to enable the council to act by a majority vote. Their names were to be added to the petition to affect the action of the council. The council would be controlled to a considerable extent by the wishes of the property owners. The nearer they approached to unanimity in favor of the work, the more likely the council would be to order it to be done. They would have a right to believe that every property owner petitioning for it did so with the expectation that he was to actually assume his share of the burdens; that he signed the petition in good faith, and not under a contract by which he was to be relieved of the whole, or any part, of his share of the cost of the improvement whilst he was seeking to have others taxed for the whole amount of their share under the law. "Any arrangement or combination among the parties applying, whereby a few individuals, desirous of causing the grading and paving to be done, procure the signatures of others to the application, by paying them a consideration therefor, either directly or indirectly, is a fraud in the law, and contrary to public policy." *Howard v. The First Independent Church of Baltimore*, 18 Md. 451.

This case is very much like the one cited. The following have some bearing upon the question: *Hatzfield v. Gulden*, 7 Watts, 152; *Gil v. Williams*, 12 La. An. 219; *Dexter v. Snow*, 12 Cush. 594; *Powers v. Skinner*, 34 Vt. 274; *Fuller v. Dame*, 18 Pick. 472; *Brown v. Brown*, 34 Barb. 533; *Devlin v. Brady*, 32 Barb. 518; *Harris v. Roof's Ex'rs*, 10 Barb. 489.

It is true that the appellants aver in their replication that

Maguire et al. v. Smock et al.

they were not opposed to the work "in itself considered," but because they did not feel pecuniarily able to bear the expense of it; that as soon as the appellees, by their contract, undertook to relieve them from the expense, they at once became equally as anxious for its accomplishment as the appellees were, and willingly petitioned for it; and hence they acted in good faith. It is possible that the other remonstrators were opposing the work for the same want of pecuniary ability to bear the expense, and not because they were opposed to it in itself considered. Perhaps all of them might have been converted upon the same terms that the appellants were. Their opposition was predicated entirely upon an objection to paying for the work. We think very few persons who would be willing to be benefited by the labor or means of others would remonstrate against paving a street in front of their property, if the cost of it was to be borne by some one else. They would not object to the work in itself considered.

It is admitted in the replication that the appellants were induced to sign the petition by reason of the guaranty set out in the complaint; that that was its sole consideration. The affirmation of good faith and denial of fraud do not relieve the act of its culpability. Courts will not aid either party to enforce such contracts. The answer was good and the replication bad.

The judgment of the said superior court is affirmed, with costs.

J. E. McDonald, J. M. Butler and E. M. McDonald, for appellants.

C. H. Test, D. V. Burns, and G. S. Wright, for appellees.

RITENOUR v. MATHEWS.

PAYMENT.—*By Third Person.*—*Acceptance by Creditor.*—Payment or satisfaction of a debt may be made by a third person to the creditor, and if accepted by him it will operate as such.

PROMISSORY NOTE.—*Surety.*—*Promise on Condition of Release.*—A surety on a promissory note, fearing he would have to pay the debt, promised his principal, that if he would procure other security and release him from liability, he would surrender certain promissory notes, which he held against the principal. The principal thereupon did substitute other securities, and the surety on being so released from liability on the note refused to comply with his promise.

Held, that the promise was without consideration and could not be enforced.

CONSIDERATION.—A promise to one to pay him, if he will do what he is already bound to do by law or by contract, is without consideration, and the law will not compel the promisor to perform his agreement.

APPEAL from the Tippecanoe Common Pleas.

DOWNEY, J.—This case has been twice before in this court; 31 Ind. 31, and 34 Ind. 279. The action was predicated upon two promissory notes held by the appellant against the appellee. Upon the return of the cause to the common pleas the last time, there was a trial by jury upon the same issues that had been previously formed, a verdict for the defendant, motion by the plaintiff for judgment *non obstante veredicto* overruled; motion for a new trial by the plaintiff also overruled; motion by the same party in arrest of judgment overruled, and final judgment for the defendant. The plaintiff duly excepted to these rulings, and having again appealed to this court, has assigned as error the overruling of his motion for a new trial, and also the overruling of his motion for judgment *non obstante veredicto*.

It will be seen by reference to the opinion in 34 Ind., that in the third paragraph of the answer it is alleged, in substance, that the notes on which the action is brought were satisfied in a contract which was made between one Jones and the plaintiff and for a consideration which moved from said Jones. In the sixth paragraph, the satisfaction is alleged to have been by and in accordance with a contract

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Ritenour v. Mathews.

made by Ritenour with Judy and Keys, and for a consideration moving to the plaintiff from them. In 31 Ind. this court held that the third paragraph was good, and that the sixth was bad, for want of the averment that the agreement was meant and intended for the benefit of Mathews. On the return of the cause at that time to the common pleas, this omitted allegation was inserted as an amendment. In the motion for judgment *non obstante veredicto*, it was insisted, and it is here insisted, that these paragraphs of the answer do not state facts sufficient to constitute a defence to the action. As we have seen, this court held in the case as reported in 31 Ind., that the paragraphs were good defences to the action, with the qualification that the sixth paragraph lacked the allegation which was afterward inserted. We are not inclined to disturb this ruling of our predecessors, but will abide by it, and adopt the result to which it may properly lead us. It seems to be the law that payment or satisfaction may be made by a third person, and that if accepted by the creditor, it will operate as such. Bouv. Law Dic., Title Payment, sec. 18.

Among the reasons for a new trial, it was urged that the verdict was not supported by the evidence. The question under the third paragraph of the answer is, whether a valid contract was made between the appellant and Jones, by which the notes in question were paid and satisfied. The question under the sixth paragraph is, whether there was a valid contract between the appellant and Judy and Keys, by which the notes were satisfied.

The defendant gave in evidence the judgment of Jones against Mathews, Anthony Ritenour, and William Ritenour, rendered in April, 1862, in the Warren Circuit Court, and the receipt of Jones for payment thereof from James Mathews, dated January 12th, 1865. Also an execution on the said judgment, dated 23d day of August, 1864, to the sheriff of Warren county, and the return of the sheriff thereon, dated February 24th, 1865. The plaintiff then admitted before the jury, as evidence, that at the time of the rendition of said

judgment he was the owner of sufficient lands in Warren county to pay said judgment, upon which the judgment was a lien.

Clement G. Jones testified as follows: I reside in Warren county, Indiana, and have since 1834; I am acquainted with the plaintiff and defendant, and with Benjamin Judy and James H. Keys; I was the plaintiff in the judgment read in evidence; I never saw the notes in suit in this cause; the defendant, Mathews, was the principal, and the plaintiff and William Ritenour were his sureties on the note upon which my judgment was obtained; before I got the judgment the plaintiff was uneasy lest he might have the debt to pay, and after it was rendered he was uneasy about the judgment, and saw me about it several times; he asked me if Mathews would put in other good security if I would release the judgment, and I told him I would; we had such conversations several times after the judgment was rendered and before it was satisfied; he wanted me to get Mathews to put in different security so that I would release the judgment, and I went to see Mathews about it two or three times; the last conversation I had with the plaintiff on the subject was in July, 1864, in harvest time; he told me that if I would accept other security from Mathews, and release him, he, plaintiff, would give up to Mathews the notes in this suit, and I agreed that I would take other good securities and release the judgment; I went on from the plaintiff's immediately and saw Mathews and told him; this was in July, before I released the judgment in January; Judy and Keys afterward became the sureties for Mathews, and I released the judgment, and got the clerk to write to the plaintiff in pursuance of the understanding with him and Mathews both; Mathews resided ten miles from me and eight miles from Williamsport; I went to see Mathews two or three times about this, and I thought I was benefiting the plaintiff and Mathews both to make the arrangement. Cross examination: There were a good many conversations between Ritenour and me about this; it came up almost every time I saw him; he told me that if

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Mathews would get other securities and release him, plaintiff, from the judgment, he would give up these notes now in suit to Mathews; and he said he had told Mathews the same thing; he, plaintiff, wanted me to see Mathews and tell him the same; that is, he wanted Mathews to get other securities to me, and have me release the judgment; I was at Ritenour's house or field in July, 1864, in harvest; he requested me to go to Mathews and see if he would give other security and have him, plaintiff, released on the judgment; I agreed with Anthony, the plaintiff, that I would release the notes in suit if I got other security, and I went and saw Mathews and told him that if he would put in securities that I would receive, the plaintiff would deliver up these notes (meaning those in suit), if I would release him from the judgment, which I had agreed to do; I don't know that much more was said; the main question all the time was to get him, plaintiff, released from the judgment; I did not see Judy and Keys about becoming security for Mathews; I went straight to Mathews' home from the plaintiff's; this conversation in July was the last I had with the plaintiff, to the best of my recollection; he said if he was released from the judgment he would give up; this was my understanding all the time from Ritenour; we talked so often about it that I cannot remember all that was said; all our conversations were substantially the same; it was the conversation each time, that if he was released from the judgment, he would give up the notes; I did not pay particular attention when he was talking to me about it; I was at Mathews' once or twice before the time mentioned in July, 1864; Mathews always told me he would try and get other securities; he, Ritenour, was afraid he would have the judgment to pay.

William Ritenour testified as follows: I am a half-brother of the plaintiff, and reside in Warren county, near the line; the plaintiff came to me and told me that he had made arrangements with Jones to see Mathews, and be released from the judgment, and he, plaintiff, would give up the notes in this suit; he, plaintiff, wanted me to ask Mathews to carry

out the arrangement he had made with Jones, and get the security; he said he had made arrangements to have other security given, and then he was to give up the notes; I saw Mathews, but do not recollect what he said. On his cross examination, he said: I do not know but the feeling between me and plaintiff was good; he told me before the judgment was rendered, that he would give up the notes if Mathews would get other securities and get him released from liability; he said he had made the arrangement with Jones to release him if he got other security; I cannot tell the day or year when it was, but it was some time after the judgment was got, and before it was released; I can't tell the year or day; his conversation amounted to the same thing each time; I had several conversations, two or three times with plaintiff about the matter, as I said before; I was equally liable with plaintiff on the judgment of Jones.

James Mathews, the defendant, testified as follows: I am the defendant in this case; Jones made a communication to me in regard to the judgment and notes in suit; he came to my home on purpose, after he had seen Mr. Ritenour, and told me the arrangement between plaintiff and himself; I went on to get security; I got Judy and Keys to go security on a new note for the debt to Jones; he, Jones, said to me, when he came to see me at the request of Ritenour, that he had agreed with Ritenour to accept other security if I gave other security such as suited him; I think it was in July, 1864, when Jones came to see me the last time; I went to work and tried to get security; I got security; when Jones received the security he went to Williamsport and had the release made; the clerk sent a certificate of the release to Ritenour; my financial condition was bad when the judgment was rendered, and up to the time it was released; I was not able to pay my debts at those times; I had some eleven thousand dollars security debts to pay; I saw Ritenour, and he said if I would give security to Jones he would give up the notes; I told him I could give the new security if he would give up the notes, but could not if he did not

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give up the notes; he said to me, you tell Keys and Judy that I will surrender the notes if you get the new security and get me released from the judgment; I told Judy and Keys what Ritenour had said; I did not see Ritenour any more till the judgment was released, and then he objected to giving up the notes, and he would not surrender them; if my memory serves me right, it was in November afterward when I told Keys and Judy of what Ritenour had said; they, Keys and Judy, went on the note. On cross examination, he said: I think it was in November, 1864, that I saw Jones; I think it was the same proposition all the time; when Jones came to see me in July, he did not communicate any new fact or information to me; I knew all about the proposition before; I had learned it from Ritenour himself. I knew that Anthony said he would give up the notes if I got the security; I asked him if he was still willing to do so, as it was a good while; he said he was as good as his word; I testified before that Keys and Judy would go on the new note if he, Ritenour, would surrender the notes in suit.

James H. Keys testified as follows: I am one of the parties who signed the note to Clem. Jones; Mathews stated to me that if he could give new security on this judgment, he could make five hundred or six hundred dollars in getting up the notes in suit; he said Ritenour would release him from the notes; he said he could make that in the operation; I signed the notes on condition that he, Mathews, could make the five hundred or six hundred dollars for his benefit. On cross examination, he stated: I do not know whether he came more than once to see me about going security or not; perhaps he did; I do not know that it was more than once; I signed it so that Mathews could meet it; he thought he could pay the note to Jones if I went on it; I was not afraid of having to pay the note, because, if I did, I had the money to do it with; well, I considered myself safe; Judy and I had a mortgage on the land of Mathews, but not given for this debt; I helped Mathews; he was made my agent; I never had the note to pay; Mr. Judy and I held a mort-

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gage on some lands and a bill of sale on some two hundred head of cattle; I furnished the money to buy them; the mortgage on the land was recorded, but cannot tell whether the bill of sale on the cattle was recorded or not; we had no specific security for this debt of plaintiff.

Anthony Ritenour, the plaintiff, testified in his own behalf, as follows: I stated to Jones several times that I would give up these notes, provided Mathews would put in new security; I made the statement to Jones and several other persons; I was uneasy about this security debt; I expected to have to pay it; this was the substance of my statements and conversations to Jones at each time; Jones came to see me in the harvest field, and we talked pretty smart, and he went to see Mr. Mathews at my request, about it, as the sheriff had sent me a notice that he had an execution on the judgment in his hands, and he would call on me for the money; if I had it to pay, I wanted to know it; these conversations were commenced before the judgment was rendered, and were kept up from time to time for pretty nearly three years; they were about the same every time; there was no particular agreement between Mr. Jones and myself that he should release me; I never made any arrangement with Jones; I told my brother so; I had not made any arrangement when I talked with my brother; I just stated my feelings, that I would give up the notes if Jones would release me; I did not tell Mathews to tell anything to anyone; I don't remember of having any conversation with Mathews after Jones came in the field, in the summer of 1864; I never gave any authority to Mathews to make any proposition for me; I never had any conversation with Judy and Keys about this matter until after the judgment was released; Mathews had from two to three hundred large cattle at the time Judy and Keys went the security, worth from five to six cents per pound, or from fifty to sixty dollars per head; Mathews was considered good in the winter of 1864 and 1865; people generally took his paper at that time. This was all the evidence in the case.

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We think it quite clearly established by the evidence that the appellant, under the fear that he would have the debt to Jones to pay, promised the appellee that if he would procure him to be released therefrom, by giving other security to Jones, he would surrender up to him the notes on which this action is brought. This is not the contract, however, which is set up in either of the paragraphs of the answer. Nor do we think it can be treated for a single moment as a valid and binding contract upon the appellant. A principal is bound by every rule of moral and legal obligation to protect his surety from the payment of the debt for which he is surety. When the debt has become due, if it is not paid by the principal, the surety may at once have his action to compel the principal to pay the debt and exonerate him from liability therefor; and when the security has been compelled to pay the debt, or any part of it, he may immediately have his action to recover the amount from the principal. / It would be a reproach to the law if the principal, under such obligations to his security, could, by failing to discharge them, and by allowing the security to be harassed by action, judgment, execution, and threatened levy, obtain from him the promise of a compensation for doing what he is thus bound to do without compensation, and maintain an action for the promised compensation, or use it to defeat the recovery of what is honestly due from him. Accordingly, it is a general principle of law, that a promise to one to pay him, if he will do what he is already bound to do by law or by contract, is without consideration, and cannot be enforced. *Reynolds v. Nugent*, 25 Ind. 328; *Ford v. Garner*, 15 Ind. 298; *Cameron v. Warbritton*, 9 Ind. 351; *Peelman v. Peelman*, 4 Ind. 612.

There is really no evidence in support of the third paragraph of the answer. The consideration for which Jones satisfied the judgment which he held, was the execution to him by Mathews of a note for its amount, with Judy and Keys as his security. Jones was spoken to on the subject, for the reason, we presume, that it could only be effected

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through him or with his consent. He was not bound to accept one security for the purpose of releasing another. He might do it, or he might refuse to do it, at his option.

As to the evidence under the sixth paragraph, which refers to an agreement with Judy and Keys, it is quite clear that there was no contract between them and Ritenour. They became parties to the note to Jones at the request and for the accommodation of Mathews, and to enable him to carry out a hard and unconscionable bargain with Ritenour. They did not have to pay anything. Keys swears that they considered themselves safe when they became security for Mathews. They had a mortgage on his land. They had a bill of sale of his goods. It is more than probable, from what appears, that they were thus covering up the property of Mathews, while the sheriff was exciting the fears of Ritenour by sending him notice that he had an execution on the judgment, and would call on him for the money. Ritenour, while he fully admits the contract with Mathews, states that there was no agreement between him and Jones, and that he never had any conversation with Judy and Keys on the subject, until after the judgment was released.

The judgment is reversed, with costs, and the cause remanded, with instructions to grant a new trial, and for further proceedings, in accordance with this opinion.

J. McCabe, for appellant.

W. C. Wilson and *J. H. Brown*, for appellee.

MCALISTER v. HOWELL.

BOND.—Consideration.—Restraint of Trade.—Suit for breach of a bond conditioned that the defendant would not sell intoxicating liquor of any kind within a certain town or a certain township, for the term of one year. The expressed consideration was, that the obligee had given a like bond to the defendant.

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Held, that the obligations of the parties must be regarded as independent, and that the execution of each instrument was an ample and valid consideration for the execution of the other; the execution and not the performance being the consideration.

Held, also, that the bond was not void as being in restraint of trade and therefore against public policy.

SAME.—Instructions.—Intention of Parties.—The court charged the jury, in substance, that if the defendant had violated his agreement, the plaintiff was entitled to recover so far as any defence that could be shown under the general denial was concerned, “no matter for what purpose, or under what circumstances the defendant sold the liquor.” The court also left it to the jury to determine as a question of fact (the defendant having filed an answer to that effect), whether it was the intention of the parties, and understood between them at the time the bonds were executed, that the defendant might sell whiskey, etc., as a medicine, and if they should so find, and that defendant had not sold for any other purpose, and only “to persons laboring under some disease, which in the opinion of a competent physician required for the cure of such disease the liquors thus sold by the defendant,” he was entitled to recover. The evidence proved that the defendant was a physician.

Held, that these charges were not liable to objection on the part of the defendant.

SAME.—Parol Agreement.—Written Contract.—A charge asked by the defendant, which undertook to control the written contract by a contemporaneous parol agreement inconsistent with the terms of the writing, was properly refused.

PLEADING.—Failure to Reply.—An affirmative answer, where the case has been tried without a reply, will be deemed to have been controverted on the trial, in the same manner as if a reply in denial had been filed.

APPEAL from the Tipton Common Pleas.

WORDEN, J.—Action by the appellee against the appellant. The complaint was in two paragraphs, which were much alike, on the following instrument executed by the defendant to the plaintiff, viz.:

“Know all men by these presents, that I, Lewis McAlister, of Tipton county, Indiana, am held and firmly bound to Thomas Howell in the penal sum of five hundred dollars, for the payment of which well and truly to be made and done I bind myself firmly by these presents, sealed with my seal and dated this 3d day of May, 1870. The condition of the above obligation is such that, whereas the said Thomas Howell has given the said Lewis McAlister a penal bond in the sum of five hundred dollars, conditioned that the said

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Thomas Howell shall not sell intoxicating liquors of any kind in the town of Windfall or Wildcat township, for the term of one year from the date hereof; now it is expressly agreed between the parties that the said Lewis McAlister shall not sell intoxicating drink, or liquors of any kind, during said term of one year, in the town of Windfall or township of Wildcat, and on the forfeiture of said bond, the same may be put in suit immediately, then the above to be void on compliance with the conditions thereof. Witness my hand and seal the day and year aforesaid.

“L. McALISTER. [SEAL.]”

Breach, that defendant sold intoxicating drinks and liquors during the time and at the place specified.

The defendant demurred to each paragraph of the complaint, but the demurrers were overruled and he excepted. He then answered¹ in six paragraphs. A demurrer was sustained to the second, which need not be further noticed, no exception being taken. The other paragraphs were as follows, in substance:

First. Want of consideration.

Third. That the defendant executed the instrument sued upon, in consideration of the execution of the bond executed by the plaintiff to the defendant, and for no other consideration; and that the plaintiff had broken his said bond by selling intoxicating liquor in violation thereof, more than ten times. The bond executed by the plaintiff is not made a part of this paragraph.

Fourth. This paragraph is filed by way of cross complaint, and may be regarded as setting up matter of set-off. It alleges that the plaintiff executed to the defendant the following obligation, viz.:

“State of Indiana, Tipton county, Indiana, ss. Know all men by these presents, that I, Thomas Howell, of Tipton county, and State of Indiana, am held and firmly bound unto L. McAlister, of Tipton county, and State of Indiana, in the penal sum of five hundred” [dollars,] “for which payment truly to be made, I bind myself, my heirs, executors, and

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administrators, forever, by these presents, this 3d day of May, 1870. The condition of the above obligation upon the conditions following, to wit: Whereas the above bound Thomas Howell is now engaged in the sale of intoxicating liquors less than a quart at a time, in the town of Windfall, in said county and State aforesaid, under a license issued by a board of commissioners of said county, under the license laws of the State of Indiana; whereas the said McAlister has this day purchased a part of the stock of liquors of the said Howell, now on hand in his grocery, in said town of Windfall, and license, which purchase is made upon the express agreement that the said Howell will not in any way, directly or indirectly, engage in the sale of intoxicating liquors of any kind or description, or in any quantities, for one year from this date, in said town or township in which said town is situated;

“Now if the said Thomas Howell will not, in one year from this date, engage in the sale of intoxicating liquors of any kind or quantity in said town or township, then this bond shall be null and void; otherwise the same shall remain in full force and virtue in law; this 3d day of May, 1870. And upon each and every violation of this bond, the said Thomas Howell shall forfeit and be liable in the sum and for the payment of fifty dollars thereof.

“THOMAS HOWELL. [SEAL.]”

Breach, that the plaintiff broke his said bond by selling intoxicating liquors of many kinds, in violation thereof, within the interdicted time and territory twenty times, whereby he became liable to the defendant for the full amount of the bond, for which amount he demands judgment, or for so much as may be found due him on the trial.

Fifth. That at the time of the execution of the bond sued on, the plaintiff was keeping a drinking saloon in the town of Windfall in said county, and divers drinking and disorderly persons were accustomed to loaf about the said saloon and idle away their time, to the great annoyance of the good citizens of the town and township; that at the same time,

and in the same town, the defendant kept and owned a drug store, and was a practising physician, and was engaged in the practice of his profession, and in the compounding of drugs and medicines for the legitimate use and purposes of his profession as druggist and physician; and in the preparation of his medicines and drugs, he had to and did use liquors which were intoxicating; all of which the plaintiff well knew at the time of the execution of the bond in suit; that in consideration that the plaintiff would quit the sale of intoxicating liquors in said town (which was an annoyance to the defendant and many of the good citizens of said town and township), and not in any way, directly or indirectly, engage in the sale of intoxicating liquors for one year, the defendant purchased a part of the liquors on hand belonging to the plaintiff for the legitimate and express purpose of using the same in his business as druggist and physician, and in no other way whatever; that he has kept all his promises and agreements with the plaintiff, and has not sold intoxicating drinks to any person or persons in violation of his covenant with the plaintiff, but has confined his sales strictly to the legitimate uses for which liquors were purchased from the plaintiff; nor has he sold any liquors to any one otherwise than in the lawful and legitimate business of his profession as physician and druggist; wherefore, etc.

Sixth. General denial.

On these pleadings the cause was submitted to a jury for trial, and there was a verdict and judgment rendered for the plaintiff for the sum of two hundred dollars.

On the trial, the court gave to the jury the following, amongst other instructions:

“1st. The plaintiff, in order to recover in this case, must prove that the defendant has, some time between the execution of the bond on which the action is brought, the 3d day of May, 1870, and the 3d day of May, 1871, sold intoxicating liquors to some person in the town of Windfall, or Wildcat township; and if he has proved this by a preponderance of evidence, he is entitled to recover under the

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general denial, no matter for what purpose or under what circumstances the defendant sold the liquor.

“2d. But the defendant has set up some special defences, which he is bound to sustain by a preponderance of evidence in order to defeat this action. The first of which is, that this bond upon which the suit is brought was executed by the defendant without any consideration whatever; and, of course, if the defendant has proved this allegation to your satisfaction, the action is defeated, and your finding should be for the defendant.

“3d. But if the evidence proves that the bond was executed in consideration that the plaintiff gave a like bond, or that the defendant” [plaintiff] “had been selling intoxicating drinks, and that he would cease selling for the term of one year, the answer of want of consideration has failed, because either is a good consideration.

“4th. The defendant also set up as a defence in his answer that at the time of the execution of the bond on which suit is brought, he was a druggist and practising physician in said township of Wildcat, and that as such it was necessary for him to use intoxicating liquors for medical purposes, and that it became and was absolutely necessary for him to use such liquors for medicinal purposes at all times, which was well known and understood by the parties at the time of the execution of the contract, and that as a consequence the right of the defendant thus to use spirits was, by the terms of the contract, reserved to him, and that he sold no intoxicating liquors during the time, that is, between the 3d day of May, 1870, and the 3d day of May, 1871, for any other than medical purposes.

“5th. And if the jury believe from the evidence that it was understood and was the intention of the parties, at the time the bonds were executed to each other, that the defendant might use and sell whiskey or other intoxicating liquors as a medicine, and that he never within the time specified, sold for any other purpose, you may find for the defendant; but such sale must be proven to have been honestly made,

in good faith, for that purpose, and not as a sale for the profit in the sale of the liquor as a beverage, but as a medicine only, to persons laboring under some disease, which, in the opinion of a competent physician, required for the cure of such disease the liquors thus sold by the defendant."

Other charges were given, but as exception was taken to the first, third, fourth, and fifth only, the others need not be specially noticed.

The defendant asked and the court refused the following instructions:

"1st. If the jury believe from all the evidence in the case that all the sales made by the defendant were made strictly in the line of his profession as a druggist and physician, he will not be liable to the plaintiff in this action.

"2d. That if the liquors of plaintiff which were on hand at the time of giving the bonds by the parties were by agreement of the parties at the time that the said liquors were to be sold and sent away from the town and township by plaintiff and defendant; and if from the evidence the jury believe that defendant did, as the agent of the citizens furnishing the money, make an arrangement with a wholesale licensed house to sell said liquors, and through said agency did sell and send off said liquors out of said town and township, this would not be a sale within the meaning of the contract between the parties."

The errors assigned, keeping in view the grounds upon which a new trial was asked, raise no other questions than those involved in the rulings upon the demurrers to the two paragraphs of the complaint, the giving of the instructions above set out as given, and in refusing those which were rejected, and in overruling the motion for a new trial on the ground that the verdict is not sustained by sufficient evidence, and in the rendering of judgment for the plaintiff.

It is objected to the complaint, first, that the bond sued on is void, being in restraint of trade, and therefore, against public policy. This point was decided against the position assumed by the appellant, in the case of *Harrison v. Lock-*

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hart, 25 Ind. 112, and we are satisfied with the conclusions arrived at in that case.

It is further objected, secondly, that the two instruments executed between the parties are to be construed as one entire contract, and that the performance of each is a condition precedent to the right of requiring performance of the other; and hence that the complaint is bad in not averring a performance by the plaintiff of the obligation entered into by him. This objection raises a question that is not free from difficulty. If the two instruments are mutual, in the sense that the performance of each is a condition precedent to the right of requiring performance of the other, the complaint is, doubtless, bad, for the reason indicated. But if the two instruments are to be construed as independent contracts, either party may, without performance on his own part, sue the other for a breach, but must respond to the other in damages for his own breach. It is sometimes a matter of some difficulty to determine whether contracts containing different stipulations to be performed by the respective parties should be construed as dependent or independent. Parsons says, 2 Pars. Con. 529: "It may indeed be safely said, that this question in each particular case will be determined by inferring, with as much certainty as the case permits, the meaning and purpose of the parties, from a rational interpretation of the whole contract." The same author observes, in the preceding page, that stipulations "may be wholly independent, although relating to the same subject, and made by the same parties, and included in the same instrument." Another writer says: "Whenever it appears to have been the intention of the parties that performance of one stipulation should not be a condition precedent to the performance of another, effect will be given to such intention; but, where the intention is to rely on a previous performance, and not on the remedy for non-performance, performance is a condition precedent." Addison Con. 926. The case of *Christie v. Borelly*, 7 C. B., N. S. 561, is remotely analogous to the present, where the stipulations

were held to be independent. The case of *Roberts v. Brett*, 18 C. B. 561, is one of some importance, where it was held that the stipulations were mutual and dependent. In the case of *Thomas v. Cadwallader*, Willes, 496, it was held, that in a covenant to repair by a lessee, the lessor allowing and assigning timber for the repairs, the assigning of the timber was a condition precedent to the obligation to repair, but the following observation was made by the Chief Justice in delivering the opinion of the court: "When two covenants in a deed have no relation to each other, I was clearly of opinion that the non-performance of one could not be pleaded in bar to an action brought for the breach of another covenant in the same deed; and for this plain reason, amongst others, that the damages sustained by the breach of one such covenant may not be at all adequate to the damages sustained by the breach of the other." Another elementary writer says: "Whether one promise be the consideration for another, or whether the performance, and not the mere promise, be the consideration," must be gathered from, and depends entirely upon, the words and nature of the agreement and the intention of the parties. "In the case of independent mutual contracts or promises, each party has his remedy on the promise in his favor, without performing his part of the contract." Chitty Con., 10 Am. ed. 807, 810.

We are of opinion that the obligations of these parties must be regarded as independent. The execution of each was an ample and valid consideration for the execution of the other; and it seems to us that it was the execution of the one instrument, and not the performance of the condition thereof, that furnished the consideration for the execution of the other. There was no relation whatever between the stipulations of the parties, though they both agreed to refrain from doing the same particular thing. The failure of the one to perform, in no manner prevented performance by the other, but subjected the party thus failing, to pay damages to the other for such failure. Each party relied, as we think,

upon his remedy against the other for a breach of his stipulations. Were these obligations to be held dependent, it would follow that a violation by one, even in one instance only, would put an end to the obligation resting upon the other; and if both parties broke their agreement in one instance only, they would both be fully absolved. This was evidently not contemplated by the parties. The objection which we have been considering is not, in our opinion, well taken. We may remark here, in passing, that no question is made in the cause as to the measure of damages upon the breach of the obligation of either of the parties.

It is objected that the complaint is too vague and uncertain, but there is no force in this objection. No error was committed in overruling the demurrers to the complaint.

We pass to the instructions. The first given informs the jury, in substance, that if the defendant had violated his agreement, the plaintiff was entitled to recover, so far as any defence is concerned that could be shown under the general denial, "no matter for what purpose or under what circumstances the defendant sold the liquor." We do not see in what respect this charge was wrong, nor do we think it had any tendency to mislead the jury. The court subsequently charged fully in respect to the special defences set up, and in some particulars quite as favorably to the defendant as the law would justify.

No objection is made to the second charge, but it is insisted that the third was erroneous. We have already had occasion to say that the execution of one of these obligations was an ample consideration for the execution of the other. Hence the charge given could have done the defendant no possible harm, if wrong as an abstract proposition. But we do not see as the charge is wrong in the abstract.

The fourth charge simply states the substance of the defence as set up in the fifth paragraph of the answer; and we do not understand, from the brief of counsel for appellant, that it does not state it as fully and favorably to the defendant as the pleading will warrant. It was drawn evi-

dently to be taken in connection with the fifth, which we will proceed to consider. This charge leaves it to the determination of the jury, as a question of fact, whether it was the intention of the parties, and understood between them at the time the bonds were executed, that the defendant might sell whiskey, etc., as a medicine, and informs them that if they should so find, and that if he had not sold for any other purpose, he was entitled to their verdict. The defendant cannot complain of the charge so far, as it was for his benefit that the literal terms of his contract were allowed to be controlled by evidence of the contemporaneous understanding and intention of the parties. We need not, and do not, decide whether, in view of the fact that the defendant was carrying on the business of a druggist, with the knowledge of the plaintiff, the contract should be so construed as to preclude the defendant from selling intoxicating liquors to be used exclusively as medicines properly prescribed. It is objected that the charge is erroneous in holding that the defendant could sell liquors as medicines only "to persons laboring under some disease which, in the opinion of a competent physician, required for the cure of such disease the liquors thus sold by the defendant."

Taking the charge altogether, we do not think the defendant has any just reason to complain of it. Why should a druggist sell intoxicating liquors as medicines to persons not laboring under any disease? Or why should he sell such liquors to diseased persons, unless they are required for the cure of the disease? And, again, who but a competent physician should determine whether they are proper remedies for the disease?

The case made showed that the defendant was a physician, and, for aught that appears, he was a competent one. He therefore could have determined in any given case, as well as other physicians, whether intoxicating liquors, either mixed or "straight," were appropriate remedies for the given disease. In the absence of the restrictions indicated in the charge, considering the expedients sometimes adopted for

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the purpose of procuring such remedies by persons having a predilection for them, the defendant might have carried on an extensive traffic in liquors as medicines, but to be really used as beverages, without violating his bond.

With regard to the charges asked and refused, it may be observed that the first was substantially covered by the charge given by the court; there was no error committed, therefore, in refusing it. The second was correctly refused, for the reason, if for no other, that it undertook to control the written contract by a contemporaneous parol agreement inconsistent with the terms of the writing.

The evidence was amply sufficient to sustain the verdict.

There was no replication filed to the answer. But it has been held in numerous cases that an affirmative answer, where the cause has been tried without a replication, will be deemed to have been controverted on the trial in the same manner as if a replication in denial had been filed.

There is no error in the record, and the judgment must be affirmed.

The judgment below is affirmed, with costs.

J. Green and *D. Waugh*, for appellant.

W. H. Clark, *N. R. Overman*, *N. W. Parker*, and *J. T. Cox*, for appellee.

SUTHERLAND v. DAVIS.

BANKRUPTCY.—Assignee.—Abatement.—Suit for the recovery of personal property. Answer, that after the bringing of the suit, the plaintiff was adjudged a bankrupt by the district court of the United States for the district of Indiana; prayer that the suit abate.

Held, that the answer was bad on demurrer. The title to property does not pass from the bankrupt by the adjudication in bankruptcy simply; but after the appointment of an assignee, a conveyance is to be executed to him. The assignee by the fourteenth section of the bankrupt act prosecutes or

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defends, in his own name, all suits to which the bankrupt was a party. The answer did not not allege the appointment of any assignee. So, also, under the twenty-first section, 2 G. & H. 51, the suit would not abate, but an assignee could prosecute the suit in his own name. The plea should have shown title in some one.

APPEAL from the Cass Circuit Court.

OSBORN, C. J.—The appellant commenced an action in the Cass Circuit Court on the 11th day of February, 1869, for the recovery of personal property, which he alleged was wrongfully taken, and unlawfully detained, from him by the appellee.

The appellee answered that after the commencement of the action, on the 3d day of June, 1870, the appellant was adjudged a bankrupt by the district court of the United States for the district of Indiana, on the petition of his creditors, and prayed judgment that the suit abate.

A demurrer to the answer was overruled, and the appellant replied, first, that after the order was made adjudging him a bankrupt, he took an appeal therefrom to the United States Circuit Court for the State of Indiana, where it was still pending, by virtue of which the bankruptcy proceedings were still pending; that said adjudication was not final, and that no assignee had been appointed, nor had the messenger or marshal of that court taken possession of his assets, nor had any proceedings of any kind been taken to enforce the decree.

Second. That after the adjudication was made declaring him a bankrupt, he filed a bill of review thereof in the circuit court of the United States for this district, under section 8 of the bankruptcy act, and gave bond therefor; that the bill was then pending in that court, pursuant to law, and that the matter was wholly undetermined; that no assignee had been appointed, nor had his assets been taken possession of by the United States marshal or messenger; and that there was no one who could maintain the action except himself.

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A demurrer was sustained to both paragraphs of the reply, and final judgment rendered that the action should abate.

Exceptions were taken to the several rulings and judgment of the court.

The appellee has not favored us with a brief, and we do not see how the rulings of the court below can be sustained.

Sections 39, 40, 41, 42, and 43 of the bankrupt act provide for proceedings against the bankrupt, for injunctions to restrain him and others from making any disposition or transfer of his property, and for taking possession of it, but such proceedings do not transfer the title from the bankrupt. The decree declaring him a bankrupt does not, of itself, have the effect to deprive him of the title and ownership of his property. Under the proceedings and orders of the court he may lose the possession and still retain the ownership of the property.

Section 14 provides, that as soon as an assignee is appointed and qualified, a conveyance shall be made to him of all the property of the bankrupt, which shall relate back to the commencement of the proceedings, "and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee." Until an assignee is appointed and qualified, and the conveyance or assignment made to him, the title to the property remains in the bankrupt. By the same section, the assignee is authorized to prosecute and defend all suits in law, or in equity, pending at the time of the adjudication of bankruptcy, in which such bankrupt was a party in his own name, in the same manner, and with the like effect, as they might have been prosecuted or defended by such bankrupt.

The answer in the case at bar does not state that an assignee had been appointed. It simply avers that the appellant had been adjudged a bankrupt. Until an assignee was appointed and qualified, there was no one to take the place of the appellant as plaintiff, and his right to prosecute the action was not divested.

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As pleas in abatement do not deny, and yet tend to delay the trial of the action, great accuracy and precision were always required in framing them. They should give a better writ. A plea of misnomer in the Christian name must state the real name. 1 Chit. Pl. 491. So, if the plea or answer relies upon a transfer of the interest of the plaintiff, to abate the action, it must state to whom the transfer has been made.

Sec. 21, 2 G. & H. 51, provides, that no action shall abate by the transfer of any interest therein; that the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action. The statute makes no distinction as to transfer, whether by the act of the party or otherwise.

It is true that in England, where an action has been commenced by the bankrupt before the bankruptcy, the defendant may defeat the action by specially pleading the bankruptcy and assignment, and the assignee will be compelled to proceed, *de novo*, in his own name. 1 Chit. Pl. 25. But by section 14 of our bankrupt act, and section 21 of our code, *supra*, no such result follows. The assignee may prosecute the suit in his own name. The demurrer to the answer should have been sustained.

The judgment of the said Cass Circuit Court is reversed, with costs; cause remanded, with instructions to sustain the demurrer to the first paragraph of the answer, and for further proceedings in accordance with this opinion.

N. O. Ross and D. P. Baldwin, for appellant.

WRIGHT v. JOHNSON ET AL. EX'RS.

STATUTE OF LIMITATIONS.—*Promissory Note*.—Suit upon a promissory note payable generally without specified time or place, executed in may, 1858. Answer, that in 1860 the defendant removed to the District of Columbia and

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has ever since resided and now resides there; that a statute of that district limits actions upon promissory notes to three years from the maturity thereof. The action was brought in 1870.

Held, that the facts pleaded constituted a defence to the action in the place where the defendant resided, and under section 216, 2 G. & H. 161, the same defence was available here.

APPEAL from the Cass Common Pleas.

WORDEN, J.—Action by the appellees against the appellant upon a promissory note executed in May, 1858, by the appellant to the deceased, at Logansport, Indiana, for the sum of a little over one hundred dollars, payable generally without specified time or place, with interest from date.

Issue, trial by the court, finding and judgment for the plaintiffs, a motion for a new trial on behalf of the defendant being overruled.

The appellant, defendant below, pleaded in bar of the action the statute of limitations of the District of Columbia, in the United States, averring that he then was, and for the last ten years had been, a resident of said district. The statute pleaded is as follows:

“Actions shall be brought within the following times from the date of the accruing of the cause thereof: Upon all accounts, within one year; upon all bonds and instruments under seal, within five years from the maturity thereof; upon all promissory notes and instruments not under seal, within three years from the maturity thereof, and not afterwards.”

Reply in denial of this paragraph.

On the trial, it was admitted by the parties that the defendant, Wright, then was a resident of the District of Columbia, and had been since 1860; that the note was executed at Logansport, Indiana, and that at the time of the execution thereof, Wright was a resident of Cass county, in said state, but that in 1860, he ceased to be a resident of Indiana, and became a resident of the District of Columbia, and has since continued to be a resident of that district, as above stated; that ever since the residence of Wright in the District of

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Columbia, the law above set out on the subject of the limitation of actions has been in force in that district.

The plaintiffs did not see proper to test the sufficiency of the paragraph of the answer setting up the statute of limitations of the District of Columbia by demurring thereto; but on the trial we must suppose the court regarded the paragraph as insufficient, inasmuch as it was clearly shown, by the admission of the parties, that it was true in point of fact.

We are of opinion that the defence pleaded was available. We have a provision that "when a cause has been fully barred by the laws of the place where the defendant resided, such bar shall be the same defence here as though it had arisen within this State." 2 G. & H. 161, sec. 216.

Wright commenced to reside in the District of Columbia in 1860, and has continued to reside there. This action was not brought until after 1870. Had the suit been brought in the District of Columbia, the statute pleaded would clearly have been a bar to the action. That being the case, our statute makes it a bar, the action being brought here. *Harris v. Harris*, 38 Ind. 423; *Van Dorn v. Bodley*, 38 Ind. 402.

The judgment below is reversed, with costs, with instructions to the court below to grant a new trial and proceed in accordance with this opinion.

BUSKIRK, J., dissents for reasons stated by him in *Van Dorn v. Bodley*, *supra*.

D. Turpie, for appellant.

S. T. McConnell and *M. Winfield*, for appellees.

BOARD OF COMMISSIONERS OF WARREN COUNTY v. GREGORY.

STATUTE.—*Assessment Law.—Printing of Delinquent List.—Compensation.—*

Sections 142 and 143 of the assessment law, as amended May 31st, 1861, require that the compensation for the publication of the delinquent list shall be made on the basis of tabular description, as contained in the duplicate, and have no reference to the number of columns in the newspaper.

EXCESSIVE PAYMENT.—*Voluntary.*—Where the commissioners have allowed an excessive claim for printing the list, there being no mistake of fact, the list being before them, and it being their duty to know the fact, the money cannot be recovered back.

BOARD OF COMMISSIONERS.—*Allowance of Claims.—Judicial Decision.—Conclusiveness.*—The board of commissioners, in acting upon claims against the county, act in a judicial capacity, and their decisions are conclusive and binding alike upon the county and the claimant, unless appealed from, or unless an independent action is brought against the county when the claim has been disallowed.

APPEAL from the Warren Common Pleas.

BUSKIRK, J.—This was an action by the appellant against the appellee to recover back the sum of two hundred and eighty-two dollars and sixty cents, which it was alleged had been illegally demanded by the appellee, and wrongfully paid by the appellant, for printing the delinquent list of Warren county.

There was issue, trial by the court, a special finding of facts, with conclusions of law thereon, and exception to the conclusions of law by appellant.

The special finding of facts and the conclusions of law thereon are as follows: "In the autumn of 1870, the defendant, at the request of the auditor of the county, and according to statute, published the list of delinquent taxes of said county, filed his bill before the board of commissioners, and was allowed five hundred and sixty-five dollars and twenty cents, which sum was then paid him for such services; that defendant performed the work of printing such delinquent list; that there were four hundred and seventy-one lines of descriptions on the duplicate, as furnished by the auditor to the printer; that the printer doubled his columns in his newspaper, and printed four hundred and seventy-one

lines, double-columned in the paper; that printed in single columns the four hundred and seventy-one lines would have made nine hundred and forty-two lines, and were equal to nine hundred and forty-two lines in the advertising column of a newspaper; that defendant charged according to the number of lines of description in a newspaper column, and not according to the number in the auditor's duplicate; that the list was printed in smaller type than ordinary newspaper type, and smaller than defendant ordinarily used in his paper; that defendant's bill, as presented, did not indicate the number of lines he claimed to have published.

"On these facts I find the defendant received no more than he was entitled to, and therefore find for the defendant.

"JNO. M. LARUE, Judge."

The appellant has assigned for error that the court erred in its conclusions of law upon the facts found.

According to the facts as found, there were only four hundred and seventy-one lines of descriptions in the duplicate, as furnished by the auditor to the printer, but the printer doubled his columns in his newspaper, and printed four hundred and seventy-one lines double-columned in the paper, which, if printed in single columns, the four hundred and seventy-one lines would have made nine hundred and forty-two lines, and were equal to nine hundred and forty-two lines in the advertising column of the newspaper.

The real question is, whether the defendant was entitled to charge and receive pay for four hundred and seventy-one or nine hundred and forty-two lines of tabular description, valuation, and taxes, the solution of which depends upon whether the number of lines was to be computed according to the list as made out by the auditor, or the number of columns as printed in the newspaper.

This involves a construction of sections 142 and 143 of the assessment law, as amended by the act of May 31st, 1861.

Such sections read as follows:

"Sec. 142. Between the first and fifteenth days of Decem-
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ber annually, the county auditor shall make out and record, in a book provided for that purpose, a list of all lands returned and remaining delinquent for taxes, describing such lands as the same are described in such duplicate, and charging them with the amount of delinquent tax, with interest, and a penalty of ten per centum on such taxes; also, with the taxes of the current year, and shall certify to the correctness thereof, with the date when the same is recorded, and sign the same officially.

“Sec. 143. He shall cause a copy of such list to be immediately published, for four weeks successively, once in each week, in a newspaper having general circulation in his county (if any be printed therein), at a cost of not to exceed fifteen cents for each insertion of every line of tabular description, valuation and taxes, in such list, and in case the publisher of such newspaper should refuse to publish the same on the terms herein provided, it shall be the duty of the auditor to have said list printed in handbill form, on the best terms that can be had, three copies of which shall be posted up in public places in each township of his county, at least four weeks before the day of sale, to which shall be attached, and in like manner published, a notice that so much of said land as may be necessary to discharge the taxes, interest and charges thereon, or due from the owner thereof at the time of sale, will be sold at public auction at the court-house in such county, on the first Monday in February next, thereafter.” 3 Ind. Stat. 518.

It is maintained by the appellant, that the true construction of the above sections is, that in determining the number of lines of tabular description, valuation and taxes, reference is to be had only to the list as prepared by the auditor, and that the appellee was only entitled to charge sixty cents for four insertions of such list as prepared by the auditor.

The appellee insists that a line of tabular description, valuation, and taxes in such list means a line across one column of the newspaper in ordinary type, and if a line in the auditor's list runs across two columns of the newspaper

in ordinary type that it would make two lines of tabular description within the meaning of the above sections.

The court below was of the opinion that the construction contended for by the appellee was correct, and rendered judgment against the appellant.

We are required to determine whether the court below erred in its construction of the statute. It is quite obvious to us that the court erred in its construction of the statute in question. The language of the above sections seems to leave no room for doubt as to the true meaning thereof. By section 142 the auditor is required to make out a tabular list, and by section 143 he is required to have such list published, at a cost of not to exceed fifteen cents for each insertion of every line of tabular description, valuation and taxes, in such list. We have thus far construed the above sections as though they stood alone. An examination of other sections of the assessment law will greatly aid in arriving at the legislative intention.

By sec. 13, 1 G. & H. 87, the assessors of real estate are required to make their returns in tabular form.

By secs. 75, 76, 77, 78, 79, and 80, of said act, the auditor's duplicate is not only required to be in tabular form, but in lines of tabular descriptions, valuation, and taxes; and the delinquent list, as far as it goes, is but a copy or transcript of the auditor's duplicate, and it is and must be not only tabular in form, but must contain the lines of tabular description in conformity to the statute. It seems to us, therefore, that it must necessarily and unavoidably follow that when the legislature provided, that the printer should have fifteen cents for each insertion of every line of tabular description, valuation, and taxes in such list, it was intended that the computation should be made of the lines of tabular description as contained in the duplicate, and had no reference to the number of columns in the newspaper.

By section 143, the printer is required, when the list is presented to him by the auditor, to determine whether he will print it for the price named. The auditor cannot leave such

list, unless the printer agrees to print it at such price. How could he determine then and there, if it depended upon the number of columns in his newspaper?

By sec. 77 of said act, the auditor is prohibited from advertising any tract or lot unless the taxes due amount to double the cost of advertising. If the position assumed by the appellee be correct, the auditor could not determine before publication, whether the cost of advertising a tract or lot would amount to fifteen, thirty, forty-five, or sixty cents for each insertion, as he would not know how many columns there would be in the newspaper. If the computation is made upon the list prepared by the auditor, he can know in advance what will be the cost of advertising.

It is provided by sec. 202 of said act, that the expense of advertising delinquent lands in public newspapers shall be paid out of the county treasury, and the amount thereof is to be charged to the respective tracts advertised. Unless the rate fixed by statute, being sixty cents for four insertions, of every line of tabular description in the auditor's list, is to control, and unless each tract or lot carried out makes a line of tabular description, the auditor cannot determine, in advance, the cost of advertising such tract or lot, so as to put it in the delinquent notice and to charge the cost thereof to the respective tracts or lots advertised.

We are of opinion that the court below erred in holding that the appellee charged no more than he was entitled to.

It is, however, maintained by counsel for the appellee, that conceding, that there was an overcharge and payment, the money so paid cannot be recovered back, for the reason that the same was voluntarily paid, with full knowledge of all the facts, or with the means of full knowledge. In the recent case of *The Lafayette, etc., R. R. Co. v. Pattison*, 41 Ind. 312, a very careful and thorough examination of the authorities was made with the view of ascertaining what were voluntary, and what were compulsory payments, and when, and under what circumstances money paid could be recovered back, and we do not now deem it necessary to

re-examine the authorities or enter into any extended discussion of the principles of law involved.

It is well settled that money paid through a mistake of law cannot be recovered back; and it is equally well settled that money paid with a full knowledge of the facts, or with the means of knowing the facts, cannot be recovered back. On the other hand, the doctrine is firmly established, that money paid in ignorance of the facts, or under duress of person or goods, or to prevent an officer from seizing and selling property or money obtained by extortion or by taking an undue advantage of the necessities of a person, can be recovered back.

The printing done by the appellee was done for the county, upon the employment and by the direction of the county auditor, who is the clerk of the board of commissioners. The auditor had furnished the list to the appellee, and had in his office the record containing the delinquent list. The appellee presented to the board of commissioners his claim for publishing the delinquent list. The court does not find that there was any mistake of fact. The only finding upon that subject is, "that defendant's bill as presented did not indicate the number of lines he claimed to have published." Did the board of commissioners know, or had they the means of knowing, the number of tabular lines of description which had been published? They certainly had the means of knowing, and the duty of knowing was imposed upon them by a positive statute.

The powers of the board of commissioners are defined and prescribed by the thirteenth section of the act providing for the organization of county boards (approved June 17th, 1852). The second clause of said section is as follows:

"2. To allow all accounts chargeable against such county, not otherwise provided for, and to direct the raising of such sums as may be necessary to defray all county expenses."
1 G. & H. 250.

The twenty-fourth section of said act reads as follows:

"Sec. 24. No allowance shall be made by such commis-

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sioners, unless such person [the claimant] shall file with such commissioners a detailed statement of the items, and dates of charge, nor until such competent proof thereof is adduced in favor of such claim, as is required in other courts; but if the truth of such charge is known to such commissioners, it may be allowed without other proof, upon that fact being entered of record in the proceedings about the claim." 1 G. & H. 252.

It is too plain to admit of argument that if the commissioners allowed the claim from their personal knowledge, there could be no mistake or ignorance as to the facts, and that money so paid cannot be recovered back.

But suppose the claim was allowed on insufficient proof. What would be the force and effect of such allowance? In what capacity do the commissioners act in allowing claims against the county? Can such allowances, as between the claimant and the county, be regarded as adjudications?

It is exceedingly difficult to give a satisfactory answer to the above questions. There is no direct adjudication covering the questions, although there are several decisions bearing upon the questions propounded.

It was held by this court in *Lyons v. Miller*, 17 Ind. 250, that the commissioners, having allowed a claim for building a bridge, could not, in the absence of, and without notice to, the claimant, rescind and set aside such allowance.

This court, in *The Board of Comm'rs of Posey Co. v. Saunders*, 17 Ind. 437, uses the following language: "The board of commissioners have very full powers in reference to the affairs of their respective counties. 1 R. S. pp. 225-230. They control the county property, allow accounts, direct the raising of sums, etc., and audit the accounts of all officers having the care, management, collection or disbursement of any money belonging to the county, or appropriated for its benefit. Section 13.

"We are of opinion that under these and various other statutes that might be referred to, the board of county commissioners have a supervisory control over the finances of

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the county, and consequently have the power to settle in reference to the same, and to bind the corporation by such settlement."

The above case was an action by the county against a former county treasurer, to recover money which it was alleged he had received and failed to account for. The treasurer, among other things, pleaded that he had settled with the board of commissioners, who had allowed his claims and demands against the county. The answer was held to be a complete bar to the action.

It was held by this court, in *The Board of Commissioners of Warrick County v. Butterworth*, 17 Ind. 129, that "under the present constitution and statutes, the board of county commissioners is, to some extent, a corporation, with powers incident thereto, and prescribed by statute, as well as limited judicial powers."

We have, after much reflection and upon mature consideration, reached the conclusion that the board of commissioners, in acting upon claims against the county, act in a judicial capacity, and that their decisions are conclusive and binding, alike upon the county and the claimant, unless appealed from, or an independent action is brought against the county where the claim is disallowed. *The Board, etc., v. Ford*, 27 Ind. 17; *Snelson v. The State*, 16 Ind. 29; *Weston v. Lumley*, 33 Ind. 486. By section 24 of said act heretofore quoted, the commissioners are prohibited from allowing a claim, except where they act upon their personal knowledge, "until such competent proof thereof is adduced in favor of such claim, as is required in other courts."

By section 31 of said act, an appeal is allowed from all decisions of the commissioners by the person aggrieved, but if such person shall not be a party to the proceeding, the appeal shall not be allowed, except upon affidavit showing an interest.

In the present case, the claim against the county was not only allowed, but was paid. There was no appeal. The order making the allowance has not been rescinded, but

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remains in full force. It is binding and conclusive upon the county, and the money paid in pursuance thereof cannot be recovered back.

The judgment is affirmed, with costs.

J. H. Brown, for appellant.

B. F. Gregory, for appellee.

FOSTER v. ALBERT.

ESTOPPEL.—Obstruction of Highway.—The widow and administrator of A. sold to B. certain real estate, of which A. was seized in fee at his death, over which ran a public street of a town. C., who owned and had erected buildings upon certain other real estate adjoining said street, was present and bid at the sale, and gave no notice of the existence of the street. B., claiming to own the land over which the street ran, obstructed the street, to the damage of C. and the public.

Held, that C. was not estopped by these facts to sue for the damage so sustained by him. The existence of the public highway was or might have been as open to the knowledge of B. as to that of C.

APPEAL from the Orange Circuit Court.

DOWNEY, J.—In this case two errors are assigned; first, the overruling of the appellant's demurrer to the second paragraph of the answer; and, second, the overruling of his motion for a new trial.

In the first paragraph of the complaint, it is alleged that the appellant is the owner of certain lots in the town of Paoli, embracing eight feet off the south side of lot 81; that running through said lot 81, and immediately north of the part thereof owned by her, there was an "open street and highway" fourteen feet wide, which had been used as such uninterruptedly, continuously, and with the knowledge of all former owners of said real estate for more than twenty years before the erection of the obstruction of which complaint is made, and that the former owners thereof, in improving and building on the said real estate owned by

plaintiff, built and erected stables and wood-sheds and other out-houses near to and abutting upon the south line of said highway, so that access could be had to said buildings, by, through, and over said highway. It is further alleged that, in 1869, the defendant, without right and without consent of the plaintiff, unlawfully obstructed said highway and rendered it impassable, by building a fence across the same, and by maintaining the said fence from that time until the present time, to the great damage of the plaintiff, etc.

The second paragraph is the same as the first, except that it alleges a dedication of the street and highway by one Thomas Coffin, who at the time was the owner of the real estate over which it runs, to the public, etc.

After demurring to the complaint, the defendant answered by a general denial, and, secondly, as follows: That said tract of fourteen feet over said lot eighty-one was an open space left by Thomas Coffin, now deceased, a former owner of said lot, for the convenient use of that part of said lot number eighty-one, upon the north side of said tract, not for use by the public as a public highway, street, or alley, and that the public never used said open space as such; that after the death of said Coffin, the fee simple title to said tract descended to his widow, Miriam Coffin, and to his children; that his estate was insolvent; that his administrator sold at public auction, the undivided two-thirds of said tract, and at the same time and place, at public auction, said Miriam Coffin sold her undivided one-third thereof, both of which interests were sold to one Riley for four hundred dollars, which amount having been paid by him, the said administrator and said widow conveyed to him the said real estate. It is also stated that said Riley has since sold and conveyed said tract to the defendant, who has fully paid the purchase-money to said Riley; that said Riley and this defendant had no notice whatever of any claim of the public or of plaintiff to an interest therein as a private way or highway, or street or alley. It is then alleged that the plaintiff attended said sale and bid for said property against said

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Riley, and saw and heard said Riley bid therefor, and gave no notice of any claim whatever in or to said tract, but permitted Riley to purchase the same for said sum, which was more than the same was worth, if the plaintiff's claim is valid; that plaintiff herself bid for the said tract three hundred and ninety-five dollars, and gave no notice to the defendant or to Riley of her claim until after the payment of the purchase-money; that the estate of Thomas Coffin had been settled before the commencement of this suit, and it as well as said Miriam Coffin is insolvent, and said Riley has no recourse on either of them for his purchase-money; that but for the acts of the plaintiff, neither said Riley nor this defendant would have invested their money in said tract; wherefore, etc.

A demurrer to the second paragraph of the answer, because it did not state facts sufficient, was overruled, and the plaintiff excepted. This is the first alleged error. We do not see upon what ground this ruling can be sustained. The reasoning seems to be this: It is alleged that there is a public street and highway in the town of Paoli, adjoining which the plaintiff's real estate is situated, on which she, or those under whom she claims have erected buildings; that the party owning the fee simple of the land over which the street and highway runs, died; that his administrator and his widow sold the estate, the plaintiff being present and bidding at the sale; that the defendant, claiming under such sale to be the owner of the land over which the street or highway runs, has obstructed the same, to the damage of the plaintiff and that of the public, etc. It is insisted that the plaintiff is estopped to sue for the damages which she has sustained by being shut out from her property or the buildings on it, caused by the obstruction of the street and highway, because she was present at the sale of the fee simple, gave no notice of the existence of the street or highway, and bid at the sale. This cannot be correct. Had the way in question been but a private way, owned by the plaintiff, there might have been more reason for the position. But streets and highways are not held by so frail a tenure, as that if an individual shall

be present and bid on the lands over which they run, when they are sold, and give no notice, the highways and streets are lost to the public, or to the person so being present and bidding, without giving notice. We are treating the second paragraph of the answer as setting up only an affirmative defence, and not as containing in its introductory statements a denial of the complaint. As the general denial was previously pleaded, we are presuming that another general denial was not intended to be contained in the second paragraph.

There are few elements of an estoppel in the case. It is not disputed in the answer that the street or highway had been and was open and in use. There is no fact which was known to the appellant with reference to the street or highway that was not, or might not have been, equally known to the appellee or to Riley his vendor. In such cases there is no estoppel. *Fletcher v. Holmes*, 25 Ind. 458. It may fairly be presumed that the fee simple was sold subject to the public highway or street.

The question or questions arising under the motion for a new trial involve the sufficiency of the evidence, but we have concluded that it is unnecessary for us to examine these questions. The court having held the second paragraph of the answer good as a bar to the action, when it was not good, we must, for this cause, reverse the judgment.

The judgment is reversed, with costs, and the cause remanded, with instructions to sustain the demurrer to the second paragraph of the answer, and for further proceedings.

T. L. Collins and *T. B. Buskirk*, for appellant.

A. J. Simpson, for appellee.

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SANXAY v. HUNGER.

WAY.—A way is an incorporeal hereditament, and consists in the right of passing over another's ground. It may arise from grant, prescription, or necessity, and is either in gross, that is, attached to the person using it, or appurtenant, or annexed to and passing with a conveyance of the estate.

SAME.—In Gross and Appurtenant.—A way is never construed to be in gross when it can fairly be construed to be appurtenant.

SAME.—When a Way is Appurtenant.—A way is appurtenant when it is incident to an estate, one terminus being on the land of another, inheres in the land, concerns the premises, and is essentially necessary to their enjoyment. It is in the nature of a covenant running with the land, and must respect the thing granted, and concern the land or estate conveyed.

SAME.—Right of Way Ascertained and Established.—Where there is no record evidence of a right of way, and the owner of the real estate over which the way is claimed denies its existence and is threatening to interrupt the use and enjoyment of the way, and has placed upon record a notice that he disputes such right, the person claiming such way may, by an action, have his right ascertained and the way established, while those who are acquainted with the facts are alive.

PRACTICE.—Objection to Judgment.—Where a general objection is made to the rendition of a judgment, and no particular objections are pointed out to the court below, such objections cannot be made for the first time in the Supreme Court.

APPEAL from the Jefferson Circuit Court.

OSBORN, C. J.—The appellee instituted an action against the appellant to establish and perpetuate an easement in adjoining lands, and to enjoin him from disturbing the appellee in the enjoyment of such easement.

The complaint consists of three paragraphs. The first alleges that the appellee, in going to and from his farm and residence, travels a certain public highway to a point named, at which point there is a private road or easement running to his said farm and residence, over the land of the appellant; that he and those under whom he claims title have resided on said farm for thirty-five years as owners thereof; that for more than that length of time he and those under whom he claims title have passed to and from his said farm with their cattle, horses, stock, teams, wagons, carts, carriages, and

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| 144 | 349 |
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| 150 | 655 |

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on foot, over and upon said road, continuously and uninterruptedly, under claim of right to, and as the owners of, said easement and right of way; that during all said period he and those under whom he claims title have had no other road or passway, or means of getting to or from said farm and residence; that the appellant denies his right to use or keep open said road, and denies the existence of said road. It also states that on the 27th of February, 1869, the appellant caused a written notice to be served upon him by the sheriff of Jefferson county, in which the land is situate; that he disputed, and would dispute, the said right of way of the appellee or his successors, and did thereby forbid the same; that he caused the notice to be recorded in the recorder's office of that county; that there has been no court held in the county since the service of the notice; and that without the easement his said farm would be of little value, and could not be enjoyed or sold in the market.

The second paragraph is like the first, except it omits the allegations about the written notice. It also alleges that his farm is surrounded on every side, except on the side of the appellant's land, where the said easement or private road passes, with precipitous bluffs of such grades and steepness that it is impossible to go to or from his said farm, residence, and improvements with his horses, wagons, etc., except by passing over said land and way, and that it is absolutely necessary to pass over said way to enjoy his said property; that in the year —, one Hull was the owner of both of said farms, and conveyed to the grantor of the appellee his said farm, and afterward conveyed to the appellant his said farm; that they both derive title from said Hull; that the appellant denies the right of the appellee to pass over his said land at any point, and threatens to destroy said way by quarrying rock out of the same, and thereby to render it impassable, and to exclude him from ingress and egress to and from his said property, and will do so if not enjoined; that he has valuable improvements on the land owned by him, consisting of a brick house, out-houses, barns, sheds,

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and other improvements of the value of five thousand dollars, and that he and his family reside in said house.

The third paragraph alleges that the grantors under whom the appellant claims title dedicated for the use of the public the way in question, as a public highway; that it was so dedicated, accepted, and used by the public as such highway for over twenty years next before the commencement of the action; that it had been distinctly separated from the remainder of the farm by a fence; that the appellant purchased his said farm well knowing of the existence of the highway, and acquiesced in the existence and use of the same until the 27th of February, 1869, when he gave the notice specified in the first paragraph. It also alleges that the dedication is evidenced by no public or private writings or muniments of title, and lies only in the recollection of witnesses and its own physical existence for the evidence of its dedication and its use as a highway; that the appellant, well knowing these facts, disputes that the road is a public highway, and that the appellee has any right of way over the same, and sets forth the notice and record of it, as in the first paragraph; that he has further declared that he will block the way or open a stone quarry in the same, and deprive the appellee of the use of it; that he will do so to the great and irreparable injury of the appellee, if he is not restrained from so doing by injunction; that if done, it will isolate his farm and make it almost valueless, prevent him from going to and from market and from attending church with his family, destroy his peace of mind, and compel him to abandon his farm.

Each paragraph contains a prayer for judgment establishing the way and easement, for an injunction restraining the appellant from disturbing or interfering with the appellee's right to use the same, and for general relief.

Motions were made by appellant to strike out parts of the complaint, referring to it by lines and pages, but not in such a way as to enable us to determine what words or parts of the complaint were included in the several motions. The court sustained the motions as to some, and overruled the same as

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to other parts, to which rulings the parties excepted. No bill of exceptions was filed, showing what was and what was not stricken out, nor does it otherwise appear than by the general language as above stated.

Separate demurrers were filed and overruled to each paragraph of the complaint, to which exceptions were taken. The general denial was filed, and a jury trial had, resulting in a general verdict for the plaintiff. The defendant filed a motion for a new trial, which was overruled, and he excepted, and judgment was rendered on the verdict, establishing the easement as set forth and prayed for in the complaint, to the width of sixteen feet, and for costs, to which the appellant excepted, as follows: "And thereupon defendant Sauxay objects and excepts to the rendition of the foregoing judgment." He also moved the court to tax to the appellee all costs made by him in the action, which was overruled, and he excepted.

The grounds for a new trial were,

1st. That the court erred in admitting evidence offered by the plaintiff, over objections of defendant.

2d. The court erred in refusing to give the instructions asked by the defendant, and each and every of them.

3d. The court erred in the instructions given to the jury.

4th. The verdict was not sustained by the evidence.

5th. The verdict was contrary to law.

The errors assigned are,—

1st. In overruling the motion for a new trial.

2d. In overruling the demurrer to the complaint.

3d. In giving instructions to the jury, and in refusing to give instructions asked by appellant.

4th. In rendering the judgment it did on the general verdict.

5th. In refusing to tax the costs to the appellee.

6th. The verdict and judgment were contrary to law and evidence, and not sustained by the evidence.

The appellant does not seem to question the sufficiency of the complaint so far as it alleges the existence of the ease-

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ment and way as claimed ; but he insists that if the allegations are true, no right of action existed in the appellee to establish or restrain him from the threatened interruption of the use of the easement.

In each of the paragraphs it is alleged that the appellant denies the existence of the easement and way and threatens to interfere with the right of the appellee to the use of it. The third charges him with threatening to wholly deprive him of his right of way over the land and all access to his farm, and that he will do so unless enjoined by the court. The second charges that he disputes his right of way, and threatens to block up and destroy it. The first and third allege that he not only disputes and denies the appellee's right, as claimed, but that he has given and caused to be recorded a notice, which the statute declares shall be deemed an interruption of the use of the way. 1. G. & H. 305, 306.

A way is an incorporeal hereditament, and consists in the right of passing over another's ground. It may arise from grant, prescription, or necessity, and is either in gross, that is, attached to the person using it, or appurtenant, or annexed to and passing with a conveyance of the estate. But it is never presumed to be in gross when it can be fairly construed to be appurtenant to the land. Washb. Easements, 161, sec. 5 ; 2 Bl. Com. 35, notes by Cooley.

Ways are appurtenant when they are incident to an estate, one terminus being on the land of another, inhere in the land, concern the premises, and are essentially necessary to their enjoyment. They are of the nature of covenants running with the land, must respect the thing granted, and concern the land or estate conveyed. Washb. Easements, 161, sec. 6.

The way claimed in the first and second paragraphs is one appurtenant to the appellee's land, and would pass as such with a conveyance of the farm. It is an interest in the land or right of way.

The appellant was the owner of the land over which the right of way or easement was alleged to exist. In other

words, the appellee was the owner of the *dominant*, and the appellant was the owner of the *servient* estate. If the appellant disputed the appellee's right, and was about to deprive him of it, we think he had a right to have it established, and to enjoin the appellant from disturbing him in its enjoyment.

The appellee claimed that he had such an interest in the real estate occupied by the right of way as gave to him an action under sec. 611, 2 G. & H. 284, to quiet his title when disputed; that it was appurtenant to his farm, an incorporeal hereditament. We do not consider it necessary to base it upon that section. If we did, perhaps we should hold that he would be within its spirit.

When the claim set up by one to an interest in land appears to be valid on the face of the record, and the defect can only be made to appear by extrinsic evidence, particularly if that evidence depends upon oral testimony, it presents a case invoking the aid of a court of equity to remove it as a cloud upon the title. *Crooke v. Andrews*, 40 N. Y. 547; 1 Story Eq., sec. 711. So a bill for an injunction will lie when easements or servitudes are annexed by grant or otherwise to private estates. 2 Story Eq., sec. 927. In this case the fee of the land was admitted to be in the appellant, subject to the easement claimed. There was no record evidence of the right claimed by the appellee. The appellant denied the existence of any way or easement, and was threatening to interrupt the appellee in the use and enjoyment of it. He had placed upon record a notice that he disputed and would dispute such right. It was important to the appellee to have his right ascertained and established, whilst the persons who were acquainted with the facts were alive. They would soon die, but the record of his notice would be perpetual. And the record of such a notice would be a perpetual menace to him and a cloud upon his title and right of way to his farm. It needs no argument to show that it would injure the value of the farm. Without a way to it, the land was comparatively valueless. No prudent man would give as much for it, with the way and

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access to it disputed and clouded with the record of that notice, as he would if it was undisputed or established by the judgment of a court. In the face of such a record, the fact that it had been used for twenty years would not quiet the apprehensions of the buyer, when the evidence of it rested entirely in the memory of witnesses, some of whom were more than eighty years old. One who would buy and pay a full price for a farm under such circumstances would manifest an amazing confidence in the recollection and testimony of witnesses, verdicts of juries, and judgments of courts.

The demurrer was correctly overruled.

We do not find anything in the record showing that the court admitted any evidence over the objections of the appellant.

We have read the evidence and the brief of the counsel for the appellant, and cannot disturb the verdict of the jury. It was the second trial of the action. There was evidence before the jury tending to sustain the allegations in the first paragraph of the complaint, and perhaps the second. Some of the witnesses were quite old. They had been acquainted with the land for fifty years or more, and with the road or right of way for over thirty years. The only question or doubt that can exist is, whether the way was used for the benefit of the appellee's farm. It was first used as a way to haul wood from the farm, and then by the occupant to get to and from it and was kept in repair for that purpose. And we think the jury were justified by the evidence in finding as they did. The instructions given to the jury are set out in full in the bill of exceptions. The appellant entered a general exception to them at the time. He has not pointed out any objection to them, and we see none. We suppose the exception was taken as a matter of precaution, so as to reserve the benefit of any error which might be discovered in the charge.

The appellant asked several instructions, which were refused. The counsel think they should have been given,

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because those given by the court on its own motion did not cover the case and were not sufficiently explicit upon some of the questions. We have compared the instructions asked and refused with those given, and think those given were sufficiently explicit, and that they included all that was asked in those refused. The latter were evidently prepared before the former were given. We do not think it would answer any useful purpose to copy them into this opinion.

The objection to the rendition of the judgment was general. No objection was made that it covered too much or that it was not warranted by the verdict. He simply objected and excepted to the rendition of the judgment. He now asks to have the judgment reversed, because, although the appellee was entitled to a judgment on the verdict, he was not entitled to the one that was rendered. The allegation in the first and second paragraph is, that the right of way was from twelve to sixteen feet wide. The verdict is, "We the jury find for the plaintiff;" and the objection is, that the judgment should have fixed the width of the right of way at twelve feet. If that objection had been made in the court below, perhaps that court would have sustained it, and established the way at twelve instead of sixteen feet. His objection was to the rendition of any judgment, and not as to its form or that it was different from what it should have been. We cannot permit him to make the objection in this court for the first time. *Baker v. Horsey*, 21 Ind. 246; *Ebersole v. Redding*, 22 Ind. 232; *Femison v. Walsh*, 30 Ind. 167; *Johnson's Adm'rs v. Unversaw*, 30 Ind. 435; *Smith v. Dodds*, 35 Ind. 452; *Train v. Gridley*, 36 Ind. 241; *Miles v. Buchanan*, 36 Ind. 490.

The appellee was entitled to a judgment for costs. Sec. 396, 2 G. & H. 225.

The judgment of the said Jefferson Circuit Court is affirmed, with costs.

C. E. Walker and *W. S. Roberts*, for appellant.

H. W. Harrington and *C. A. Korbly*, for appellee.

 Wilson v. Fatout et al.

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BOND FOR CONVEYANCE.—*Assignment as Collateral Security.*—Where a bond for the conveyance of real estate is assigned to secure the payment of a debt, the assignee does not acquire an absolute and unconditional right to the same, or to the land. The assignment is in the nature of a mortgage.

SAME.—In such case, a proceeding by the assignee to foreclose the interest of the assignor in the premises and the sale and purchase of such interest by the assignee vest in him all the interest which the assignor had in the premises, and give him the same right as if he had received an absolute and unconditional assignment of the bond.

SAME.—*Suit Against Assignor.*—*Suit Against Maker of Bond.*—*Former Adjudication.*—Suit by such an assignee against the assignor to recover the debt, to secure which the bond was assigned, and to foreclose the interest of the assignor in the premises, to which suit the makers of the bond were made parties, such proceedings being had therein that the assignee obtained a judgment against the assignor for the amount of his debt, and a finding that the makers of the bond had been fully paid their purchase-money, and that they had no interest in the premises, and a decree was rendered for the sale of the premises and an application of the proceeds to the payment of the judgment against the assignor;

Held, that this constituted no bar to an action brought by the assignee after he became the purchaser under the decree, against the makers of the bond, for damages for a breach of the agreement to convey, or to obtain specific performance.

APPEAL from the Marion Circuit Court.

WORDEN, J.—Action by the appellant against the appellees. The complaint embraced two paragraphs. The first alleged, in substance, the following facts:

On April 29th, 1863, one Samuel Brown was the owner of certain real estate described in the complaint, and on that day he mortgaged the same to Henry August Hugo for purchase-money, and this mortgage was duly recorded.

On September 1st, 1864, Brown conveyed and warranted the property to the appellees, Joshua L. and Moses K. Fatout.

On January 12th, 1865, the appellees sold the property to Isaac E. Johnson for the consideration of two thousand dollars then in hand paid, and executed to him a bond in the penalty of twice the amount of the purchase-money, stipu-

lating, amongst other things, that Johnson was to have possession on the 20th of the same month, and pay the taxes accruing on the property from and after the 1st of January, 1865; and that the Fatouts should, on reasonable request, make him a warranty deed in fee simple for the premises.

On September 25th, 1865, Johnson assigned the bond above mentioned to the appellant, Wilson, to secure the payment of a promissory note for the sum of two thousand dollars, payable in six months, with ten per cent. interest, stipulating in the assignment that he would warrant the title to be free from all incumbrances.

Afterward, the note executed by Johnson to the appellant having matured, and not having been paid, the appellant brought suit against him thereon in the Marion Court of Common Pleas, seeking also to foreclose the interest of Johnson in the premises, making the appellees parties thereto, and also one Sims A. Colley, who had a tax lien upon the premises.

On February 16th, 1867, he obtained judgment in that suit against Johnson on the note, for the amount thereof with interest, and for the sale of Johnson's interest in the premises. Nineteen dollars were found due to Colley for his tax lien, and the sum was ordered to be paid before the plaintiff's claim.

On May 4th, 1867, the premises were sold on an execution issued upon the above named judgment, and the plaintiff became the purchaser at the sum of two thousand four hundred and seventy dollars, and afterward he received the sheriff's deed therefor.

The plaintiff afterward demanded a deed from the defendants, which they refused to execute.

On the 6th of October, 1866, said Henry August Hugo, recovered a judgment against said Brown, in the Marion Court of Common Pleas, for the foreclosure of his said mortgage, amounting, with the interest, to the sum of seven hundred and thirty-five dollars and thirty cents, and on

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March 2d, 1867, the property was sold on execution issued upon the last mentioned judgment, and said Hugo became the purchaser thereof at the sum of seven hundred and ninety dollars and sixty-eight cents, and on March 4th, 1868, the sheriff executed to him a deed for the premises.

On August 8th, 1868, said Hugo, for the consideration of eight hundred and one dollars, conveyed the premises to the defendants; that on, etc., the defendants agreed with the plaintiff that they would procure the right of Hugo in the premises and convey the same to the plaintiff. It is further averred that the plaintiff had no knowledge or information of the interest of Hugo in the premises until after the execution of the sheriff's deed to him. Prayer for damages in the sum of three thousand five hundred dollars.

The second paragraph of the complaint was substantially the same as the first, except that it prayed for specific performance, in favor of the plaintiff, of the contract of the defendants with said Isaac E. Johnson.

The defendants answered in three paragraphs, but the third was stricken out on motion, and the first was withdrawn, leaving the defence to rest upon the second, which set up the following facts:

That on January 15th, 1867, the plaintiff instituted a suit in the court of common pleas of Marion county, Indiana, against the defendants and Elizabeth Fatout, wife of one of the defendants, and said Isaac E. Johnson, and also Sims A. Colley (the same suit mentioned in the complaint herein), alleging in his complaint therein the execution of the bond by the defendants to Johnson, and the assignment thereof by Johnson to the plaintiff to secure the payment of the note for two thousand dollars, "as alleged in the complaint herein," and that the note was due; that on February 5th, 1866, the premises had been sold for delinquent taxes for the year 1864, for the sum of nine dollars and thirty-eight cents, to said Sims A. Colley; that the plaintiff was ready to pay said taxes, penalties, and costs; that said Elizabeth Fatout was the wife of said Moses K. Prayer that the plaintiff

might recover \$3000 against Johnson, and \$25 against the defendants (herein) on the warranty in said bond, and that all the right, title, and interest of the defendants therein might be sold to satisfy the plaintiff's claim. That summons was served on all the defendants in that action, and that such proceedings were thereupon had therein, that the court did, on the — day of February, 1867, on the final hearing of said cause, find that Johnson executed the note to the plaintiff, and to secure the payment thereof assigned to him the bond which the defendants herein had executed to said Johnson (as alleged in the complaint herein), and that the note was due and wholly unpaid; that said Joshua L., Moses K., and Elizabeth Fatout had no right in or lien upon said premises, but that they had been fully paid for the same; that Sims A. Colley had a just and prior lien on the premises for the taxes paid by him in the sum of \$19.00; on which facts so found the court adjudged that the plaintiff recover of Johnson \$2278.87, together with the amount due said Colley for said taxes; that the premises be sold to satisfy said judgment and costs; and that the proceeds of the sale be applied, first, to the payment of said Colley's claim; second, to the costs in said cause; third, to the payment of the plaintiff's said claim; any overplus to be paid to said Johnson, after, etc. That said judgment remains in full force, etc.

The defendants say that the adjudication in said cause is a full and complete bar to this suit, because the said plaintiff therein chose his remedy and determined the relief he was entitled to; and all the matters relating to the liabilities of these defendants on the said bond were fully determined or involved, and might have been determined therein.

And the defendants, afterward, on August 8th, 1868, purchased the premises from Hugo for the consideration mentioned in the complaint, as they lawfully might without in any wise reviving their liability on said bond.

They further say that there was no consideration for the said promise to procure the rights of the said Hugo and

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convey the premises to the plaintiff, as alleged, but the same was made without consideration and is void. Wherefore, etc.

The plaintiff demurred to the second paragraph of the answer, assigning as cause that it did not state facts sufficient, etc., but the demurrer was overruled, and exception taken. The plaintiff electing to abide by his demurrer, final judgment was rendered for the defendants.

The only question before us relates to the ruling on the demurrer.

The plaintiff, by the assignment to him of the bond, did not acquire an absolute and unconditional right to the same, or to the land mentioned, inasmuch as the assignment was made merely to secure the payment of a debt. The assignment was in the nature of a mortgage.

But the proceedings in the Marion court of common pleas, to foreclose the interest of Johnson in the premises, and the purchase of that interest by the plaintiff, vested in him all the interest which Johnson had in the premises, and gives him the same right as if he had received an absolute and unconditional assignment of the bond. It follows that the plaintiff can sue the appellees, the makers of the bond, for a breach thereof, or to enforce a specific performance of the same. The bond, it will be observed, acknowledged the receipt in full of the purchase-money, and bound the obligors to make a warranty deed for the premises in fee simple on reasonable request. The plaintiff, having made such request, and the same not having been complied with, he is entitled to damages for a breach of the bond, or to a specific performance of the contract, unless he is precluded by the matter set up in the second paragraph of the answer. It is claimed by the counsel for the appellees that "the judgment and proceedings in the court of common pleas, set up in the second paragraph of their answer, is a complete bar to the suit of the appellant."

They say: "In the case in the common pleas set up in said answer, the appellant obtained all the relief he asked;

he could have obtained a decree for conveyance from appellees, but did not take it; in preference, he had a finding that appellees had been fully paid and had no interest in the premises, and for a sale of the premises to satisfy his mortgage or equitable lien; and he purchased the premises at the sale by the sheriff, and received the sheriff's deed."

In the case of *Crosby v. Feroloman*, 37 Ind. 264, it was held, that where a mortgagor stipulated in the mortgage to pay the money secured by the mortgage, and the mortgage was foreclosed without taking a personal judgment against the mortgagor on his stipulation, no action could be afterward maintained against him on his stipulation, to recover any deficit after exhausting the mortgaged premises, inasmuch as such judgment might have been taken at the time of the foreclosure.

The court say (p. 278): "The mortgage in question was an entire contract, stipulating for the payment of the money, and pledging the lands therefor. The plaintiff having brought suit on the mortgage, and taken judgment of foreclosure only, when he might have taken a personal judgment for the residue after exhausting the mortgaged premises, it is clear, under the authorities, that he cannot now maintain another action to recover a personal judgment for such residue." In the same case, the court quote the following passage from a case cited: "That the judgment, or decree of a court possessing competent jurisdiction is, as a general rule, final, not only as to the subject-matter thereby actually determined, but as to every other matter which the parties might litigate in the cause, and which they might have had decided, can admit of no doubt."

The question arises whether in the action which the appellant brought against Johnson, Colley, and the appellees, in the Marion court of common pleas, to foreclose the interest of Johnson in the premises, the appellant could have had judgment against the appellees for damages for failing to convey according to their contract, or for specific per-

formance thereof. If he could, it would seem to follow that he cannot now maintain an action for either purpose.

Upon an examination of the allegations of the complaint in that action, we are of opinion that there was no matter stated therein that authorized a judgment in favor of the appellant against the appellees, either for damages or for specific performance. Indeed the appellees would seem to have been unnecessary parties to that action. Perhaps, however, they were proper parties for the purpose of concluding them as to the matter stated in their bond, viz., the receipt by them from Johnson of the purchase-money for the premises. Beyond this there was no allegation in the complaint that authorized any judgment against them. The court found that the appellees had no right in, or lien upon, said premises, but that they had been fully paid for the same; but no judgment whatever was rendered against them, unless the judgment for the sale of the premises be regarded as against them. There was, to be sure, a prayer in that complaint that the appellant recover of the appellees \$25 on the warranty in the bond. This we suppose was on account of the tax lien. But no such judgment was rendered, nor were any facts alleged that would have authorized it.

We have seen that by the terms of the bond the appellees were bound to convey only upon reasonable request. Until such request was made, either by Johnson or some party succeeding to his rights, the appellees were in no manner in default, and no action could be maintained against them either for damages for a breach of their contract or for specific performance thereof. They were not bound to convey until requested to do so, and their contract was in no manner broken until such request was made and they failed to comply with it. The tax lien worked no breach of the bond; because until the appellees were bound to convey, they were not bound to remove liens.

We need not determine whether the appellant as the holder of the bond for the purpose of securing his debt against Johnson, and before he had foreclosed Johnson's

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interest, could have legally demanded a conveyance from the appellees, or have enforced performance of their contract. It is sufficient for the purposes of this case to say that the appellees had not, so far as appears, been called upon to perform their contract until after the action in the court of common pleas; and hence they were not in default until after that time.

There was no allegation in the complaint in that action that the appellees had been requested to make the conveyance. There was no foundation, therefore, for any judgment against them, based on the assumption that they had broken their contract. Until after that time they had not, so far as appears, broken their contract. It follows that no judgment could have been rendered against them in that action for the non-performance of their contract.

From these considerations, it is apparent that the matters involved in this action, viz., the liability of the appellees for damages for a breach of their contract, or their obligation to specifically perform the same, they having been requested by the appellant to make the conveyance and having failed to do so, were not, and could not have been, adjudicated upon in the action in the court of common pleas, and therefore, that that action is no bar to this.

We are of opinion that the court erred in overruling the demurrer to the second paragraph of the answer.

The judgment of the court below is reversed, with costs, and the cause remanded, for further proceedings in accordance with this opinion.

T. A. Hendricks, O. B. Hord, A. W. Hendricks, and J. Buchanan, for appellant.

N. B. Taylor and E. Taylor, for appellees.

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WITNESS.—*Credibility.—Conviction of Infamous Crime.*—Every person who, after the adoption of section 79, p. 999 of the Revised Statutes of 1843, was duly convicted of the crime of treason, murder, rape, arson, burglary, robbery, manstealing, forgery, or wilful and corrupt perjury, was incapable of giving evidence in a court of justice, prior to the adoption of section 243 of the present code; since the adoption of said section 243, such conviction may be shown to affect the credibility of a witness.

SAME.—It is error to permit the introduction in evidence of a record showing an indictment for an assault and battery with intent to commit a rape, and showing an acquittal of the intent and a conviction for a simple assault and battery, for the purpose of affecting the credibility of a witness.

EVIDENCE.—*Practice.*—Where a party against whom incompetent or inadmissible evidence has been admitted objected at the proper time and in the proper manner, and excepted to its admission, he need not afterward move to strike it out, in order to have the benefit of his exception.

INSTRUCTION.—*Illegal Evidence.*—Where an instruction to a jury does not withdraw illegal evidence or direct the jury to disregard it, though its legal import may be that the evidence is incompetent or insufficient, the instruction does not cure the error in admitting the evidence.

TRIAL.—*Commencement of Trial.*—With reference to the statute fixing the time when objections to depositions must be made (sec. 266 of the code), the swearing of the jury is the commencement of the trial.

DEPOSITION.—*Motion to Suppress.*—A court cannot suppress a deposition after the jury is sworn, unless the objection relate to some matter not disclosed in the deposition.

APPEAL from the Montgomery Common Pleas.

DOWNEY, J.—The appellee sued the appellant for her own seduction. The defendant demurred to the complaint, because the same did not state facts sufficient to constitute a cause of action; the demurrer was overruled, and he excepted. An issue of fact was formed by the general denial; there was a trial by jury, a verdict for the plaintiff, a motion by the defendant for a new trial overruled, and judgment on the verdict. The overruling of the demurrer to the complaint, and the refusal to grant a new trial are the errors assigned.

The first alleged error is not argued or urged by counsel for the appellant. We see no objection to the complaint.

One Steel, the physician who attended the appellee in

her confinement, testified as a witness, and his evidence was to a vitally material point in the case. The appellee, in her rebutting evidence, was allowed, over the objection of the appellant, to give in evidence, evidently for the purpose of affecting his credibility as a witness, the record of a prosecution against him for an alleged assault and battery with intent to commit a rape, in which he was acquitted of the intent to commit the felony, and found guilty of a simple assault and battery, and this was made a ground of the motion for a new trial. The bill of exceptions, with reference to this point, states: "And be it further remembered that during the trial of said cause, and while the rebutting evidence of the plaintiff was being given to the jury, the plaintiff offered to introduce in evidence in her behalf the record of the indictment, trial, and verdict in the case of *The State of Indiana v. Armstrong T. Steel*, indictment for an assault with intent to commit a rape, tried in the Montgomery Circuit Court, March term, A. D. 1859, to the introduction of which record in evidence the defendant then and there, at the proper time, objected, on the ground that said evidence was wholly irrelevant. Which objection the court overruled (the attention of the court was not called to the fact that the conviction was for a simple assault and battery until after the record was given in evidence) and permitted said record to be read in evidence to the jury (which record elsewhere in this bill of exceptions appears). To which ruling of the court admitting said record to be read in evidence to the jury, the defendant then and there by his counsel at the proper time excepted." The indictment charges an assault and battery with intent, etc., although the bill of exceptions speaks of it as an assault with intent, etc.

We know of no law by which this evidence could legally be admitted. It is provided by sec. 243 of the civil code, that any fact which might theretofore have been shown to render a witness incompetent, may be thereafter shown to affect his credibility. To determine what crimes rendered a witness incompetent at the date of the civil code, we must

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refer to the statute previously in force, which is sec. 79, p. 999, Revised Statutes of 1843, and which declared that any person who might thereafter be duly convicted of the crime of treason, murder, rape, arson, burglary, robbery, man-stealing, forgery or wilful and corrupt perjury, should ever after such conviction be deemed infamous, and, among other disabilities, be incapable of giving evidence in any court of justice. It will be seen that neither the crime with which the witness was charged nor that of which he was found guilty rendered him incompetent as a witness prior to the code, and could not therefore be shown to affect his credibility under the code. It was doubtful at common law, what crimes rendered the perpetrator thereof infamous. 1 Greenleaf Ev., sec. 373. Hence, we presume, the enactment of the statute of 1843 on the subject. Not all felonies render the perpetrator of them infamous. *Pruitt v. Miller*, 3 Ind. 16. But it is urged that the objection to the evidence was not sufficiently pointed out. As the record was not admissible for any purpose, and showed upon its face that it was inadmissible, and as it was objected to on the ground of its irrelevancy, we think it should have been excluded. See *McVey v. Blair*, 7 Ind. 590.

It is further urged that the appellant should have moved to have the evidence stricken out. We cannot think that where a party, against whom incompetent or inadmissible evidence is offered, has objected to it in proper time and manner, and it has been admitted over his objection, to which he has excepted, he must afterward move to strike out such evidence, in order to have the benefit of his objection and exception.

Again, it is contended that the error was cured by the instruction of the court to the jury. The court said: "The record instrument of the conviction of the witness Steel, shows that he was indicted for a felony, but he was acquitted of the felony and convicted of a misdemeanor, which is not infamous, although it was a conviction for an assault and battery on a woman."

The instruction did not withdraw the record from the jury, nor did it direct the jury to disregard it. We do not think that the instruction cured the error in admitting the record in evidence. The learned judge seems to have supposed that if the witness had been convicted of the aggravated assault and battery, he would thereby have been rendered infamous. This we have seen was a misapprehension.

Another reason for a new trial was that the court, after the jury was sworn, heard and sustained a motion by the plaintiff to suppress a deposition which had been taken and filed by the defendant; and in this connection counsel discuss the question as to the time when the trial shall be said to have commenced. Counsel for the appellant contend that it has commenced when the jury has been sworn, while opposing counsel insist that it commences at a later stage of the cause. We are of the opinion, with reference to section 266 of the code, which fixes the time when objections to depositions shall be made, that the swearing of the jury is the commencement of the trial. The object of the section is that parties may know, so far at least as apparent objections are concerned, that they can depend upon reading in evidence such depositions as have been regularly placed on the files, to be read in the cause, and which have not been suppressed. The rule provided by the statute is convenient, as well as fair; for why empanel and swear a jury to try a cause, which the parties may afterward be prevented from trying on account of the suppression of depositions after the jury are sworn? We hold that the court should not have entertained the motion to suppress the deposition after the jury was sworn, unless the objection related to some matter which was not disclosed in the deposition, which was sufficient to authorize such suppression. It is not shown for what cause the deposition was suppressed, and hence we cannot decide whether it was rightly suppressed after the jury was sworn or not.

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There are other questions discussed, but they are not much relied upon, and we need not consider them.

The judgment is reversed, with costs, and the cause remanded, with instructions to grant a new trial, and for further proceedings.

J. E. McDonald, J. M. Butler, and S. C. Willson, for appellant.

P. S. Kennedy and J. McCabe, for appellee.

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JUDGE.—*Bill of Exceptions*.—A person who has been a judge, and presided at the trial of a cause, possesses no power to sign a bill of exceptions in such cause after he has ceased to be a judge.

SAME.—The successor in office of such judge has full power to sign a bill of exceptions embodying the evidence, and this court is bound to presume that in exercising such power he acted upon reliable information.

WITNESS.—*Assignor*.—*Claim Against an Estate*.—Where one sues as assignee upon an account, or upon a note equitably assigned, and makes the assignor a party to answer as to his interest, the assignor and assignee are not adverse parties; their interests are identical; and where the cause of action is filed as a claim against an estate, the assignor cannot testify as a witness for the assignee.

STATUTE OF LIMITATIONS.—*New Promise*.—*Acknowledgment of Debt*.—*Evidence*.—No acknowledgment of a debt barred by the statute of limitations, or promise to pay it, is sufficient to take the case out of the operation of the statute, unless the same be contained in some writing signed by the party to be charged thereby. It is not competent to prove such acknowledgment or promise by parol.

SAME.—*Part Payment*.—*Parol Evidence*.—Part payment may be proved by parol.

SAME.—An admission of continued indebtedness may be inferred from the fact of part payment; but the court is not allowed to imply such admission as an inference of law. It must be left to the jury.

SAME.—Part payment is only *prima facie* evidence of an admission of continued indebtedness, and may be rebutted by other evidence and the circumstances under which it was made.

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SAME.—In order to take a case out of the statute of limitations by part payment, the payment must have been on account of the debt for which the action is brought.

SAME.—The force and effect of part payment is the same under the code that it was at common law, but no indorsement or memorandum of any payment, made upon any instrument of writing, by or on behalf of the party to whom the payment purports to be made, will be deemed sufficient to take the case out of the operation of the statute.

APPEAL from the Marion Common Pleas.

BUSKIRK, J.—James B. Hill filed a claim against the estate of John L. Ketcham, deceased, on an account against Ketcham in favor of his father, John F. Hill, for goods sold and delivered and money collected. Account assigned in writing, but not sworn to. Defendant filed answer in seven paragraphs, viz.: 1st. General denial. 2d. Denying that plaintiff is the real party in interest, and alleging that it was assigned to him by his father, John F. Hill, in order to enable him to testify, under an understanding that the assignor should have the benefit of any judgment that might be rendered. 3d. Payment. 4th. Statute of limitations. 5th. Plea in abatement, that decedent's partner's (Coffin's) personal representatives should be made parties defendants. 6th. Partial answer, that certain items were bought for one John Ketcham, and not for his own use. 7th. As to part of claim, plea of statute of frauds, that goods were sold to another party and no agreement in writing to answer for his debt or default.

Plaintiff filed a reply in five paragraphs, viz.: 1st. General denial. 2d. Reply to 4th paragraph of answer, acknowledgment of indebtedness and partial payment within six years. 3d. Reply to 5th paragraph of answer, that Coffin had long since deceased, and his estate been settled as insolvent. 4th. Reply to 6th paragraph of answer, that goods were charged to decedent by his own directions, and that assignor did not know they were for any other person. 5th. Reply to 7th paragraph of answer, that goods were purchased by decedent and by him directed to be charged against him.

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Cause submitted to Court for trial; finding for plaintiff in the sum of \$101.37. Defendant filed a motion with reasons for new trial, viz.: 1. Errors of law occurring on trial and excepted to at proper time, to wit: 1st. Permitting the assignor of the account, John F. Hill, to testify as a matter of right. 2d. Allowing the plaintiff to give in evidence the testimony of the assignor as to conversations had with the decedent in his lifetime. 3d. Allowing plaintiff to introduce proof of a contract, not in writing and signed by the decedent, to take the case out of the operation of the statute of limitations. 2. The verdict is contrary to law. 3. The verdict is contrary to evidence. 4. The verdict is not sustained by sufficient evidence. Which motion the court overruled, and defendant excepted. Court orders administratrix to pay sum found due plaintiff out of the assets of the estate.

The appellant has assigned for error the overruling of the motion for a new trial.

It is claimed by counsel for appellant that a new trial should have been granted upon the grounds:

First. That the court erred in permitting the assignor of the account, John F. Hill, to testify on the trial, as a matter of right.

Second. That the court erred in allowing the plaintiff to give in evidence the testimony of the assignor as to conversations with the deceased during his lifetime.

Third. That the court erred in allowing the plaintiff to introduce proof of a contract, not in writing and signed by the decedent, to take the case out of the operation of the statute of limitations.

Before considering the questions presented by the assignment of errors, we are required to decide a motion submitted by the appellee, which is as follows:

“The appellee moves the court to strike out and reject from the record in this cause the paper purporting to be a bill of exceptions, for the reasons following:

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" 1. The said paper was and is not signed by any person legally authorized to sign the same.

" 2. The said Solomon Blair, the Judge before whom the said cause was tried, before signing said paper, had resigned the office of Common Pleas Judge, and had been appointed and was qualified as Judge of the Superior Court of Marion County, Indiana; and at the time of signing said paper was Judge of said Superior Court.

" 3. The said Livingston D. Howland, whose name appears to said paper, was not Judge at the time of the trial, nor until after the resignation and appointment of said Blair to said office of Judge of said Superior Court.

" N. B. & E. TAYLOR,

" Att'ys for Appellee."

It is shown by the record that the cause was tried before the Honorable Solomon Blair, Judge of the Marion Common Pleas Court. The bill of exceptions is signed as follows:

" SOL BLAIR, Judge

" Sitting at time of trial.

" LIVINGSTON HOWLAND,

" Judge."

It was decided by this court, in *Smith v. Baugh*, 32 Ind. 163, that a person who had been judge and had presided at the trial of the cause possessed no power to sign a bill of exceptions, in such cause, after he had ceased to be judge.

Such ruling is founded on sound reason and is supported by authority, and settles the question that Judge Blair possessed no power to sign the bill of exceptions in the present case, when he had ceased to be the Judge of the Marion Common Pleas Court.

It remains to inquire whether his successor in office, Judge Howland, who had not presided at the trial and had no personal knowledge of what the evidence was upon the trial, could sign a bill of exceptions embodying the evidence.

We are referred by counsel for appellee to section 346, 2 G. & H. 209, and to *Halstead v. Brown*, 17 Ind. 202, as supporting his position, that Judge Howland possessed no power

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to sign such bill of exceptions. Section 346 of the code reads as follows :

"Sec. 346. Where the decision is not entered on the record, or the grounds of objection do not sufficiently appear in the entry, the party excepting must reduce his exception to writing, and present it to the judge for his allowance and signature. If true, the judge shall sign it, whereupon it shall be filed with the pleadings as a part of the record, but shall not be spread at large on the order book. If the writing is not true, the judge shall correct it, or suggest the correction to be made and sign it."

In *Halstead v. Brown, supra*, this court said :

"A bill of exceptions was corrected and signed by the judge who tried the cause.

"The appellant contended that the bill was incorrect, and procured a mandate from the Supreme Court to the judge below to correct it, or show cause, etc. The mandate was served, but no return was made by the judge. On a rule for attachment, the return was, that the judge was dead. If the judge who tried the cause could have corrected the bill without the consent of both parties, a point we do not decide, (see *Heaston v. The Cincinnati, etc., R. R. Co.*, 16 Ind. 275) we think no other judge could, and that the remedy in that particular was at an end. See Perk. Prac. 312; *Ex parte Bradstreet*, 4 Pet. Sup. Ct. (U. S.) Rep., p. 102. The judge signs, or refuses to sign, a bill of exceptions upon his own recollections of the facts of the case, refreshed as it may be from any sources existing."

The only point decided in *Heaston v. The Cincinnati, etc., R. R. Co., supra*, at all bearing upon the question under examination is, "that the court can not legally alter the record of its proceedings after the term, and that a bill of exceptions can not be altered."

The only point decided in *Ex parte Bradstreet, supra*, was, that the Supreme Court would not compel a District Judge to sign a bill of exceptions which he did not believe to be true, he having already signed one which he believed spoke

the truth. Mr. Chief Justice MARSHALL, in very strong and decided language, expressed his disapproval of the practice of presenting bills of exceptions to a judge weeks after the trial and asking him to correct them from memory. He very correctly said, that "the law requires that a bill of exceptions should be tendered at the trial. But the usual practice is to request the judge to note down in writing the exceptions, and afterward, during the session of the court, to hand him the bill of exceptions, and submit it to his correction from his notes. If he is to resort to his memory, it should be handed to him immediately, or in a reasonable time after the trial. It would be dangerous to allow a bill of exceptions of matters dependent on memory, at a distant period, when he may not accurately recollect them. And the judge ought not to allow it."

It is very correctly maintained by counsel for the appellant, that Judge Howland, possessed full and ample power to sign the bill of exceptions; and the case of *Smith v. Baugh*, *supra*, is relied upon as being decisive of the question in their favor.

In that case the cause was tried before Judge Park, who gave time until the first day of the next term to prepare and present the bill of exceptions. In the mean time, Judge LaRue became the judge of said court. The bill of exceptions was signed by Judge Park after he had ceased to be judge, and Judge LaRue had been qualified and was acting as such. The court held that the bill of exceptions "was without authority of law and void." The court then say: "A change of the judge, after judgment, and before the bill of exceptions was signed, did not change the court; for all judicial purposes it remained the same, and the succeeding judge of the court might, within the time limited, have settled and signed the bill of exceptions. *Hedrick v. Hedrick*, 28 Ind. 291."

The case of *Hedrick v. Hedrick*, *supra*, was an action for a divorce. There was issue, trial by a jury, finding for plaintiff, and answer to interrogations. These proceedings were

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had before Judge Gooding. After verdict, and before final decree, Judge West succeeded Judge Gooding. Judge West, without hearing any evidence, rendered a final decree granting a divorce and allowing alimony and providing for the custody of the children. This court affirmed the judgment, and held that "the change of judges did not change the court; for all judicial purposes that remained identical."

The case of the *Life and Fire Insurance Company of New York v. Wilson's Heirs*, 8 Peters, 291, is much in point, and has an important bearing upon the case in judgment. The case was tried before the District judge of Louisiana, and a judgment was rendered and entered upon the order book, but the judge who tried the cause died without signing the judgment. The judge appointed to succeed such deceased judge refused to sign the judgment upon the ground that he possessed no power to do so. The plaintiff sought by *mandamus* to compel him to sign it. The Supreme Court compelled the judge to sign the judgment.

The court say :

"In this case the district judge seems to think, that as the judgment was not rendered by him, he has no power to grant a new trial, as he is not acquainted with the facts and circumstances which should influence his discretion in making such an order; and that, consequently, he is not bound to sanction the judgment, by his signature.

"By the law of Louisiana, and the rule adopted by the district court, the judgment, without the signature of the judge, cannot be enforced. It is not a final judgment, on which a writ of error may issue, for its reversal. Without the action of the judge, the plaintiffs can take no step, unless it be the one they have taken, in this case. They can neither issue execution on the judgment, nor reverse the proceedings by writ of error. And if the reasons assigned by the judge shall be deemed a sufficient answer to the rule, the plaintiffs are without remedy on their judgment.

"But the district judge is mistaken in supposing that no one but the judge who renders the judgment can grant a

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new trial. He, as the successor of his predecessor, can exercise the same powers, and has the right to act on every case that remains undecided upon the docket, as fully as his predecessor could have done. The court remains the same, and the charge [change] of the incumbents cannot and ought not, in any respect, to injure the rights of litigant parties."

The foregoing authorities conclusively settle the doctrine that Judge Howland was authorized to exercise the same powers, and had the right to act on any case that remained undecided upon the docket, as fully as his predecessor could have done. If a judge who has not heard the evidence on the trial of a cause can render judgment, grant a new trial, and sign the record of a judgment rendered by his predecessor, he surely can settle and sign a bill of exceptions. We entertain no doubt as to his power to do so, and the only difficulty we see in the exercise of such power results from the want of correct knowledge as to what the testimony had been upon the trial. Where a judge has exercised such power, we are bound to presume that he acted upon reliable information, for he is not required by the above quoted section of the code to sign a bill of exceptions unless it is true. We are, therefore, of opinion, that the bill of exceptions is properly in the record, and that the motion of appellee should be overruled.

We proceed to consider the errors assigned, and the first question presented for our decision is, whether the court erred in permitting John F. Hill, the assignor of the account, to testify as a witness for the assignee as a matter of right.

The positions assumed by counsel for appellant are stated as follows, in their brief:

"In discussing this question, we desire to refer to some of the principles of construction, as laid down by the elementary writers on that question, and the decisions of our own and other courts on the same point. Blackstone says (vol. 1, p. 87): 'There are three points to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy; that is, how the common law

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stood at the making of the act; what the mischief was, for which the common law did not provide; and what remedy the parliament hath provided to cure this mischief. And it is the business of the judges so to construe the act as to suppress the mischief and advance the remedy.'

"Kent says (vol. 1, p. 461): 'It is an established rule in the exposition of statutes, that the intention of the lawgiver is to be deduced from a view of the whole, and every part of a statute, taken and compared together. The real intention, when accurately ascertained, will always prevail over the literal sense of terms.' In the *United States v. Collier*, 3 Blatchf. C. C. 325, Judge BETTS says:

"'The intention which forms the governing principle of the law is to be extracted from the entire enactment; and, to ascertain the legislative will, courts not only search all the provisions of the particular statute, but may look out of that to others *in pari materia*, or of a similar purport,' etc. In *People v. Dana*, 22 Cal. 11, Judge COPE, C. J. FIELD concurring, says: 'It is a cardinal rule of interpretation that a statute must be construed with reference to the objects intended to be accomplished by it.' In Potter's ed. of Dwaris' work on statutes, we find a collation of rules of different authors, to which we refer. Rule 20, p. 128. Vattel says: 'The reason of the law or treaty, that is, the motive which led to making of it, is one of the most certain means of establishing the true sense; and great attention ought to be paid to it whenever it is required to explain an obscure, equivocal, and undetermined point, or to make an application of them to a particular case. As soon as we certainly know the reason, which alone has determined the will of him who speaks, we ought to interpret his words, and to apply them in a manner suitable to that reason alone.' Also, in rule 23, p. 129: 'To violate the *spirit* of the law by pretending to respect its letter, is a fraud no less criminal than an open violation of it. It is not less contrary to the intention of the legislature, and only shows a more artful and deliberate malice.' Puffendorf says (p. 133 of same): 'It gives great

light to the interpretation of obscure passages, to compare them with others that have some affinity with them; or to compare them with what goes before or follows in the context. * * * * That which helps us most in the discovery of the true meaning of the law, is the reason of it, or the cause which moved the legislator to enact it. This ought not to be confounded with the mind of the law; for that is nothing but the genuine meaning of it; for the finding out of which, we call in the reason of it to our assistance' Domat says: p. 141, 'Laws which favor * * * * as well as those intended to favor particular individuals, ought to be interpreted with all the liberality to which these interests are justly entitled, in an equitable point of view, and ought not to be interpreted severely, nor be applied in a manner calculated to prejudice the persons intended to be favored.'

"The following rules are given by the author as general rules in America: Rule 4, p. 144. 'It is the duty of courts so to construe statutes as to meet the mischief and to advance the remedy, and not to violate fundamental principles.' Rule 7, Ib. 'The intention of the legislature may be found from the act itself, from other acts *in pari materia*, and sometimes from the cause or necessity of the statute; and wherever the intent can be discovered, it should be followed with reason and discretion, though such construction seem contrary to the letter of the statute; this is the rule where the words of the statute are obscure.' Rule 8, Ib. 'A thing within the intention, is within the statute, though not within the letter; and a thing within the letter is not within the statute, unless within the intention.' Rule 12, Ib. 'In the construction of a statute, every part of it must be viewed in connection with the whole, so as to make all its parts harmonize if practicable, and give a sensible and intelligent effect to each.' Rule 17, p. 145: 'All statutes *in pari materia* are to be read and construed together, as if they formed parts of the same statute, and were enacted at the same time.' Rule 18, Ib. 'Statutes are to be interpreted

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with reference to the principles of the common law in force at the time of their passage, except when the statute itself or the courts have otherwise determined, and this rule is the same in courts of equity as of law.'

"From these authorities, we feel justified in assuming the following propositions to be the law on this point: 1st. That the courts will examine all statutes *in pari materia*, for the purpose of discovering what was intended to be declared by a particular statute. 2d. That the courts will, in the construction of statutes, allow the intention to govern, if such an intention can be discovered, with especial reference to advancing a remedy, or doing away with an evil. With these propositions to assist us, we call the attention of the court to the enactments of the legislature on the subject of evidence. Prior to 1852, our courts were governed substantially by the common law rules of evidence, but experience had taught that the rule might be extended, leaving it for a jury to decide how much truth and falsehood a man convicted of a crime or shadowed by a seeming interest would weave into his story; but they still left up the barriers as against parties to the suit, and those whom their condition had indissolubly joined together. 2. R. S. 238, sec. 80. A few years passed by and the legislature deemed it advisable to again enlarge the rule, and in 1855 allowed certain officers who might be parties to suits, to testify where they were only interested as trustees of certain funds. 2 G. & H. 168, sec. 238. Experience having proved the wisdom of throwing open wide the door for the purpose of arriving at the truth, the legislature, in 1861, again enlarged the rule, and threw down all the barriers that hedged around the witness stand, and allowed every one capable of testifying intelligently to give his knowledge to the jury, leaving it to them to judge of its credibility, but carefully provided in their proviso that this might only be done when both parties could give their version, excluding only those whom the court might judge to be incapable of understanding what they might say, and persons in whom, according to the pol-

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icy of the law, professional secrets should remain inviolate. Acts 1861, p. 51; 2 G. & H. 168. This act gave the largest liberty to witnesses that has ever been reached by legislative enactments in this State, and thus it remained for a while, but the experience of four years showed that the bounds had been extended too far, and the legislature amended the act of 1861, by adding the words, 'and in cases where a party to a suit pending in any court in this State, whose deposition has been taken in such suit, and is on file in such court, dies, and such suit is prosecuted by or against the executor, or administrator of such deceased party, the opposite party shall be allowed to testify on the trial of the cause, and such deposition may be read in evidence by, and on behalf of the representative of such deceased party: And provided further, That in all suits by or against heirs, founded on a contract with or demand against the executor, the object of which is to obtain title to, or possession of land or other property of such ancestor, or to reach or affect the same in any way, neither party shall be allowed to testify as a witness as to any matter which occurred prior to the death of such ancestor, unless required by the opposite party; and the assignor of the plaintiff in any such suit where there has been an assignment of the cause of action shall be deemed and held to be a party within this provision.' Acts 1865, Spec. Ses., p. 160-1-2. This was a very material alteration of the act of 1861, in two particulars; first, it extended the provision from executors, administrators, and guardians to heirs; and, second, it provided by legislative enactment, what has always been a rule of law, that no man can do indirectly that which the law forbids him to do directly; that a person can not render himself competent as a witness by assigning his cause of action, and ceasing to be a party to a suit. But the legislature did not stop here. Experience had shown that in spite of all previous precautions parties had succeeded in getting in their own testimony against the sealed lips of the dead, and in 1867, the last act in reference to witnesses was passed, by which the rule allowing parties to testify

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where the deposition of the decedent had been taken and filed was so abridged that the living was only allowed to speak concerning those matters of which the dead had left his knowledge on record. If there is any principle to be gathered from all these acts of the General Assembly, it is that so well expressed by Judge GREGORY of the last Supreme Bench in the case of *Malady v. McEnary*, 30 Ind. 273, when he said: 'The evident intent was, in suits by or against heirs, to exclude the testimony of the parties to the action as to any matter which occurred prior to the death of the ancestor, so as to prevent the living from testifying against the representative of the dead. Death having sealed the lips of one, the law seals the lips of the other.' The marked haste with which successive legislatures retraced the steps that had been taken by preceding ones, and in this particular direction alone, prove this more conclusively than words of ours can do.

"But it was argued below and will, we presume, be argued here, that whatever may have been the secret intention of the legislature, its legal intentions are only to be gathered from the words of the enactment, and that these words refer solely to the cases of suits directly against heirs, and can not be made to apply to those of personal representatives; and taking the language of the last proviso by itself, we confess that there seems to be at first glance an appearance of plausibility in it; but we have seen that courts will not confine themselves to the language of any one part of a statute, or any one statute even, but will examine every part of all the statutes bearing on the question, to determine, in the language of Blackstone, 'the mischief and the remedy,' and finding, according to Potter, *supra*, that 'a thing within the intention is within the statute, though not within the letter,' will have no hesitation in saying that it has been the expressed intention of the law-making power in this State to throw open to its widest extent the door for the discovery of truth, where it can be done without giving an undue advantage to one party, but that it has been as earnestly

their endeavor to see that in this matter both parties should be placed on a perfect equality, so that where by the act of God the one party has been prevented from relating his version of the matters in controversy, by the act of the law-making power the other party is required to keep silence and be heard only through the mouths of the witnesses, unless the court trying the cause shall, in the exercise of a sound discretion, deem it advisable to call the party to the witness stand."

We have, after much reflection, and upon very mature consideration, arrived at the conclusion, that the words, "and the assignor of the plaintiff in any such suit, where there has been an assignment of the cause of action, shall be deemed and held to be a party within this provision," apply to both the provisos contained in said section.

The second section of the act of March, 1867, reads as follows :

" Sec. 2. Persons insane at the time of examination, children under ten years of age, and incapable of properly understanding the facts about which they are examined, husband and wife as to matters for or against each other, or as to communications made to each other during marriage, except that the wife shall be a competent witness in cases of prosecutions against the husband for assault and battery upon the person of his wife, and except also that in suits by the husband and wife jointly for an assault and battery upon the wife, such wife shall be a competent witness to prove the assault and battery. Attorneys at law, as to confidential communications from a client, or advice given to such clients; physicians, as to matters confided to them in course of their profession; clergymen, concerning any confessions made to them in course of discipline enjoined by the church, shall not in any case be competent witnesses, unless with the consent of the party making such confidential communication: Provided, That in all suits where an executor, administrator, or guardian, is a party in a case where a judgment may render either for or against the estate represented by such exec-

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utor, administrator or guardian, neither party shall be allowed to testify as a witness unless required by the opposite party, or by the court trying the cause, except in cases arising upon contracts made with the executor, administrator or guardian of such estate, and in cases where a party to a suit pending in any court in this State, whose deposition has been taken in such suit, and is on file in such court, dies, and such suit is prosecuted by or against the executor or administrator of such deceased party, the opposite party shall be allowed to testify, on trial of the cause, on all material points and matters of fact embraced in the deposition, and on no other facts, and such deposition may be read in evidence by and on behalf of the representatives of such deceased party: And provided further, That in all suits by or against heirs, founded on a contract with, or demand against, the ancestor, the object of which is to obtain title to, or possession of, land or other property of such ancestor, or to reach or affect the same in any way, neither party shall be allowed to testify as a witness as to any matter which occurred prior to the death of such ancestor, unless required by the opposite party or by the court trying the cause, and the assignor of the plaintiff in any such suit, where there has been an assignment of the cause of action, shall be deemed and held to be a party within this provision."

The first section of said act declares who are competent witnesses. The first part of the second section renders certain persons incompetent to testify in any case, and upon any subject. It is then provided, that confidential communications made to attorneys, physicians, and clergymen shall not be disclosed without the consent of the party making them. Then follows the proviso in reference to witnesses in suits where an executor, administrator, or guardian is a party, and this is followed by the words, "and provided further, that in all suits by or against heirs," etc. The section then closes with the sentence in relation to the right of the assignor to testify "in any such suit." It is urged by counsel for appellee that the word "*provision*" limits the operation of the

last clause of the section to suits by or against heirs. It does not necessarily result from the fact the words, "and provided further," are used, that they are to be regarded as separate and distinct provisos. They both relate to the same subject-matter, the competency of parties to testify in certain suits. The one relates to suits where an executor, administrator, or guardian is a party, and the other to suits by or against heirs. The plain and obvious purpose of the legislature was to prevent one party from testifying where the other party to the contract or transaction was dead. The first section of the act removed the disabilities of parties and rendered them competent witnesses. The purpose of the legislature was to limit and restrain the operation of the first section and prevent it from applying in all suits where an executor, administrator, or guardian is a party, and in all suits by or against heirs. Judge STORY, in *Minis v. The United States*, 15 Pet. 423, thus defines a proviso. He says: "The office of a proviso, generally, is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview."

The word "provision" will apply to the one class of suits as well as to the other. In fact, there is greater reason, in the administration of justice, for excluding the assignor of a claim against the estate of a decedent from testifying, than there is in actions by or against heirs. The former class of suits are much more frequent than the latter. But they both come within "the mischief to be remedied." This, too, is the grammatical sense of the words of the entire proviso, in the order in which they stand, for it is all embraced in one sentence, and is so connected as to form but one entire sentence.

But, conceding that we may be mistaken, in holding that the sentence under examination applies to all suits where an executor, administrator, or guardian is a party, we entertain no doubt that the assignor of a claim against the estate of a

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decendent is excluded by the spirit and intent of the act. The assignment of an account, under the code, does not vest the legal title in the assignee. It is a mere equitable transfer, which does not authorize the assignee to maintain an action in his own name, without making the assignor a party to answer as to his assignment or interest in the claim. The assignor does not warrant the solvency of the claim, nor is he responsible to the assignee if he fails to collect the account. The account of itself proves nothing. The making out of an account against the estate of a decendent, its assignment, and the filing of the same, create no legal liability. The correctness of the claim must be proved by competent and sufficient evidence, before the court can allow the same. When the assignee sues upon an assigned account or upon a note equitably assigned, and makes the assignor a party, to answer as to his interest therein, the assignor and assignee are not adverse parties. Their interests are identical. This was so decided by this court, in *Cox v. Davis*, 16 Ind. 378, under the act of 1855, which authorized adverse parties to call upon each other to testify. The court held, that although they occupied nominally adverse positions on the record, but really their interests were identical, and not adverse, hence, Sample, the assignor, was not a competent witness for the plaintiff to prove the alleged claim. The same principle applies here and excludes the assignor, the object of both statutes being to prevent one side of the case from being shown by a party directly interested in having the same made out, where the other side could not have that advantage.

To hold otherwise, would be a clear evasion of the statute, and would defeat its whole purpose and intent. It would open the door to the most monstrous wrongs. The assignment of claims would become frequent, and estates would be wasted, eaten up, and ruined by stale and dishonest claims. We are very clearly of the opinion that the court erred in permitting John F. Hill, the assignor of the claim, to testify as a witness in behalf of the assignee.

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It is next insisted by the counsel for appellant that the court erred in permitting the appellee to prove by parol an acknowledgment of the correctness of the account and the payment of the sum of two dollars on the claim, for the purpose of taking the case out of the operation of the statute of limitations.

No acknowledgment of, or promise to pay, a debt barred by the statute shall be sufficient to take the case out of the operation of the statute, unless the same shall be contained in some writing, signed by the party to be charged thereby. It is not competent to prove such acknowledgment or promise, by parol.

Part payment may be proved by parol. An admission of continued indebtedness may be inferred from the fact of part payment; but the court is not allowed to imply such admission as an inference of law. It must be left to the jury. It is only *prima facie* evidence, and may be rebutted by other evidence, and by the circumstances under which it was made. Further, in order to take a case out of the statute by part payment, it must appear that the payment was made on account of the debt for which the action is brought. The force and effect of part payment is the same under our code that it was at common law, but no indorsement or memorandum of any payment made upon any instrument of writing, by or on behalf of the party to whom the payment shall purport to be made, shall be deemed sufficient to take the case out of the operation of the statute. *Kisler v. Sanders*, 40 Ind. 78.

The court manifestly erred in overruling the motion for a new trial.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to grant a new trial, and for further proceedings in accordance with this opinion.

J. L. Mitchell and W. A. Ketcham, for appellant.

N. B. Taylor and E. Taylor, for appellee.

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DRAKE v. MURPHY ET AL.

SHERIFF.—*Judgment.—Execution Against Joint Debtors.*—When a judgment has been rendered against several persons, none of them being sureties, and an execution is issued upon the judgment, the sheriff is not bound to exhaust the personal property of all the defendants, before levying upon the real estate of any of them.

SAME.—When any one of such judgment debtors has no personal property subject to levy, the sheriff may levy upon his real estate.

SAME.—A sheriff is not bound by the provisions of section 441 of the code to go to the party whose property is to be levied upon, to get him to exercise the right of designating what property is to be levied upon, where he possesses such right.

SAME.—*Excessive Levy.*—Where real estate is levied upon, and it can be divided, it is the duty of the sheriff to sell only so much as may be necessary to satisfy the execution, and a levy upon a larger tract or parcel than is necessary, and the advertisement thereof for sale, cannot be objected to on the ground of an unreasonable or excessive levy.

APPEAL from the Tipton Common Pleas.

DOWNEY, J.—The appellant filed his complaint against the appellees, to which they demurred, on the ground that it did not state facts sufficient to constitute a cause of action; the demurrer was sustained by the court, the plaintiff excepted, and final judgment was rendered for the defendants. The plaintiff appeals, and has assigned as error the sustaining of the demurrer.

The complaint states, that on the first day of February, 1869, Murphy, Johnson, and Holliday recovered a judgment in said court against Jacob W. Stratford, Thomas W. Stratford, James A. Franklin, Harvey Cox, Joseph Cooper, and John C. Halley; that an execution was duly issued upon said judgment on the 16th day of December, 1870, and placed in the hands of McCreary, the sheriff of said county, who afterward levied the same on certain real estate, being one hundred and twenty acres, which is particularly described in the complaint, as the property of said Cox, and which said sheriff advertised for sale on the 18th day of March, 1871. It is alleged that the amount claimed to be due on the judg-

ment is one hundred and thirteen dollars and eighteen cents, for which sum the execution issued; that the real estate levied upon is worth the sum of three thousand dollars; that ten acres of it would be ample to pay the judgment; that the levy is unreasonable and excessive; that the plaintiff is the owner in fee of said real estate, having, on the 25th day of January, 1870, purchased the same from said Cox, and has ever since been in the possession thereof; that Cox, soon after the sale and conveyance of said property to plaintiff, removed to parts beyond the limits of the State of Indiana, where he has ever since remained; that all the other defendants in said judgment, except the said Stratfords, are residents of the county of Tipton, Indiana, and are the owners of personal property, and especially the said Joseph Cooper, who owns large amounts of personal property, within the bailiwick of said sheriff, out of which said debt can be made, subject to execution and levy, and was at the time the execution came to the hands of the sheriff, and still is, such owner of said property, all of which is liable to and held by the lien of such execution. It is also alleged that said Cooper is the owner of valuable real estate in said county, liable and subject to be levied upon by said execution, with the lien of said judgment upon it; that the levy upon the property of the plaintiff was without his knowledge or consent, and he knew nothing of the same until after the land was advertised for sale; that the said sheriff is about to sell his said real estate, and will sell the same, unless restrained by legal authority from so doing.

Prayer for an injunction and for general relief. The complaint is verified by the affidavit of the plaintiff. A temporary injunction was granted, which, we suppose was understood to be dissolved when the final judgment was rendered for the defendants, although no order was made with reference to it.

The judgment defendants are all principals. Drake must stand in the same position as Cox, from whom he purchased. The question is this: When a judgment has been rendered

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against several persons, none of them being securities for others, and an execution is issued upon the judgment, must the sheriff exhaust the personal property of all the execution defendants before he can levy upon and sell the real estate of any of them? We think the sheriff was not bound to exhaust the personal property of all the defendants before levying upon the real estate of any of them, unless the statute requires him to do so. It is only by statute that the personal estate of an execution defendant is made primarily liable. The statute on the subject reads as follows:

"In all cases where the personal estate of the debtor, subject to execution, is insufficient to satisfy the execution, the real estate shall be exempt from levy and sale until the personal estate is levied upon and sold, unless the debtor shall direct otherwise, and the principal messuage, lands or tenements of the debtor, or upon which he may reside, shall not be levied upon unless other property can not be found sufficient to satisfy the execution in the hands of the sheriff." 2 G. & H. 242, sec. 444. It is quite evident that the word "insufficient," in the foregoing section, is a mistake, that the prefix should be left off, that the word "sufficient" is the word intended, and that the section should be read with that change, in order to carry out the manifest intention of the legislature. But reading the section thus, it does not seem to sustain the position assumed by the appellant. When there is but a single execution defendant, there is no doubt as to the intention. Then the personal estate, where it is sufficient, must be first sold. The section does not require that the personal estate of all the execution defendants, where there are several of them, shall be exhausted before the real estate of any of them shall be levied on and sold. We think that when any one of them has no personal property subject to levy, the sheriff may levy upon his real estate. See *Starry v. Johnson*, 32 Ind. 438, and cases there cited. But it is insisted that a demand should have been made of Drake, the appellant, and that he should have had an opportunity to designate that part of his property

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first to be levied upon. As the judgment was a lien upon all the land, and as it was all subject to sale, if necessary, to pay the debt, and as no other property of Drake was liable to be sold, we do not see the force of the objection. But however this may be, we do not think the statute requires the sheriff to go to the party whose property is to be levied upon, to get him to exercise the right of designating, where he possesses such right. 2 G. & H. 241, sec. 441.

Again, it is claimed that the levy was unreasonable and excessive, and that for this reason the demurrer should have been overruled. We do not think so. The mere levy upon the property and the advertisement of it could do no harm. When the sheriff came to sell it, it was his duty to sell only so much of the property as might be necessary to satisfy the execution. If ten acres of the land were worth enough and would sell for enough to satisfy the execution, as alleged, the sheriff should sell no more, unless the tract could not be divided. 2 G. & H. 249, sec. 466.

The judgment is affirmed, with costs.

D. F. Lindsay, J. Green, and D. Waugh, for appellant.

N. R. Overman, N. W. Parker, and J. T. Cox, for appellees.

MARLEY v. NOBLETT.

PRACTICE.—Assignment of Error.—Motion for New Trial.—Error in permitting a deposition to be read in evidence, and erroneous instructions given to the jury, are covered by an assignment of error in overruling a motion for a new trial, if such matters are properly embraced in the motion for a new trial.

SAME.—Motion for New Trial.—A motion for a new trial on the ground of error of law occurring at the trial must point out the error relied upon to sustain the motion. So of error in giving instructions, the instructions objected to must be pointed out. So of irregularity in the proceedings of the jury, the irregularity complained of must be pointed out.

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| 42 | 85 |
| 135 | 584 |
| 49 | 85 |
| 147 | 512 |

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SAME.—Bill of Exceptions.—To present any question upon a motion for a new trial, on the ground that the verdict is not sustained by the evidence, or that the verdict is contrary to law, or that excessive damages have been given, the evidence must be put into the record by a bill of exceptions.

SAME.—Time of Filing.—Where time is given, extending beyond the term, within which to file a bill of exceptions, the record must show affirmatively that the bill was filed within the time limited, or it will be disregarded.

STATUTE OF FRAUDS.—Contract.—Time of Performance.—Where no time is fixed for the performance of a contract, or where it is to be performed by a certain day (not precluding the right to perform sooner), or where the performance depends upon a contingency which may or may not happen within the year, the contract is not within the statute of frauds.

APPEAL from the Martin Circuit Court.

WORDEN, J.—Action by the appellee against the appellant. The complaint contained two paragraphs. The first was upon an account for the use and occupation of certain real estate. The second averred, in substance, that the plaintiff let to the defendant the premises, on the first of February, 1862, for the term of three years from that date; in consideration whereof, the defendant agreed that he would “during said term” furnish the materials and enclose the land with a substantial post and plank fence; that pursuant to the letting, the defendant took possession of the premises, and occupied the same during said term, and appropriated the rents and profits thereof to his own use, but wholly failed during said term, or at any time afterward, to enclose the land, or any part thereof, with a fence, as stipulated for; to the damage of the plaintiff of one thousand dollars.

Issue, trial by jury, verdict and judgment for the plaintiff for the sum of two hundred and sixty dollars.

The defendant moved for a new trial, and filed the following reasons :

“ 1st. Error of law occurring at the trial, and excepted to by the defendant at the time.

“ 2d. Irregularity in the proceedings of the court, by which the defendant was prevented from having a fair trial, by giving to the jury erroneous instructions.

“ 3d. That the verdict of the jury is not sustained by sufficient evidence.

“4th. The verdict of the jury is contrary to law.

“5th. Excessive damages.

“6th. Irregularity in the proceedings of the jury, by which the defendant was prevented from having a fair trial.”

This motion being overruled, the defendant excepted.

The errors assigned are :

“1st. The circuit court erred in permitting the deposition of W. A. Wilcox to be read in evidence on the trial of said cause.

“2d. In giving the third instruction to the jury.

“3d. In giving the fourth instruction to the jury.

“5th. In rendering judgment upon an insufficient complaint.” of the cause.

“5th. In rendering judgment upon an insufficient complaint.

All the errors assigned, preceding the fourth, are covered by that.

The first, second, and sixth reasons for a new trial are entirely too indefinite and uncertain to raise any question. The second urges as an irregularity the “giving to the jury erroneous instructions.” The instructions supposed to be erroneous are in no manner identified or pointed out, either by number or otherwise. This, it has been held in a great number of cases, is insufficient. The third, fourth, and fifth reasons for a new trial depend for their validity upon the evidence. But the evidence is not legitimately in the record, nor are the instructions.

On the overruling of the motion for a new trial, sixty days were given “to prepare and file” a bill of exceptions. Afterward, two bills of exceptions were filed by the appellant; one containing the evidence, and the other the instructions given. These bills appear to have been signed within the time limited, but when they were filed does not appear. There is no note or memorandum indicating the time of the filing thereof. It has been held, in a large number of cases, that where time is given after the term, in which to file a bill of exceptions, the record must show affirmatively that it was filed within the time limited, or it will be disregarded.

We have, however, looked through the evidence as con-

Marley v. Noblett.

tained in the bill of exceptions, and find no ground to disturb the verdict. The evidence was conflicting, and had to be reconciled or some portions of it disregarded.

What we have said disposes of all the errors assigned, except the fifth, which is the last. It is urged that the complaint is bad because it shows a contract void by the statute of frauds, not being reduced to writing.

This objection has no application to the first paragraph of the complaint, and is not well taken as to the second. The letting, as alleged in the second paragraph, was for a term of three years, and "leases not exceeding the term of three years" are excepted from the operation of the statute of frauds. 1 G. & H. 348, sec. 1, clause 5. But it is urged, that as the fence was to be built during the three-year term, the defendant's contract was not to be performed within a year, and hence comes within that clause of the statute which requires agreements not to be performed within one year from the making thereof to be reduced to writing. We shall not stop to enquire whether, inasmuch as the lease was not within the statute, the whole contract was not exempt from its operation. The defendant had the whole term of three years in which to build the fence; but he might have built it within a year from the letting, in strict accordance with the terms of the alleged contract. The rule is, "that where no time is fixed for the performance of the contract, or where it is to be performed by a certain day (not precluding the right to perform sooner), or where the performance depends upon a contingency which may or may not happen within a year, the contract is not within the statute." *Wilson v. Ray*, 13 Ind. 1.

The defendant's contract was clearly not within the statute.

There is no error in the record, and the judgment must be affirmed.

The judgment below is affirmed, with costs and five per cent. damages.

S. W. Short, for appellant.

N. F. Malott and *T. R. Cobb*, for appellee.

SHAFFER v. BRONENBERG ET AL.

PLEADING.—*Party in Interest.*—Where in a complaint on a promissory note it is alleged that the note was indorsed to the plaintiff, an answer alleging that the plaintiff is not the real party in interest amounts to nothing; nor does an allegation that the payee of the note sold and assigned it to the plaintiff and certain other persons, meet the allegation that it was indorsed to the plaintiff.

NEW TRIAL.—*Motion.*—That the court erroneously sustained a motion to strike out certain pleadings, is not a cause for a new trial.

APPEAL from the Madison Circuit Court.

DOWNEY, J.—This was an action by the appellees, as the indorsees of one Noland, the payee, against the appellant, as the maker of a promissory note, a copy of which is filed with the complaint. The appellant answered in nine paragraphs. The fourth and fifth were stricken out on motion of the plaintiffs. Demurrers were sustained to the first, seventh, and ninth paragraphs. There was a reply by general denial to the other paragraphs. The issues were tried by the court, there was a finding for the plaintiffs, a motion for a new trial, made by the defendant, was overruled, and there was final judgment for the plaintiffs.

Three errors are assigned by the appellant in this court. 1. The striking out of the fourth and fifth paragraphs of the answer. 2. The sustaining of the demurrer to the first, seventh, and ninth paragraphs of the answer. 3. The refusal to grant a new trial.

It is conceded by counsel for the appellant that the same facts set up in the fourth and fifth paragraphs of the answer were admitted under the third paragraph, and that the striking out of the fourth and fifth, if an error, was one which did not harm the appellant. We need not, therefore, examine that error, if an error it was.

The first, seventh, and ninth paragraphs of the answer set up, in substance, that the plaintiffs are not the real parties in interest, and allege that the note is the property of the plaintiffs and certain other persons, including the defendant,

all of whom are residents of Madison county ; that Noland, the payee of the note, for a valuable consideration, before the commencement of this suit, sold and assigned said note to all the persons named, jointly ; and that each and all of said persons are of full age, more than twenty-one years old, of sound mind, have no guardian, and need none.

The complaint alleges an indorsement of the note by Noland to the appellees, and the legal effect of the indorsement was to vest the ownership of the note in them, and these paragraphs do not properly controvert that fact. The allegation, that the plaintiffs were not the real parties in interest, amounts to nothing in opposition to the admitted fact that the note was indorsed to them. The allegation that Noland sold and assigned the note to all the persons named does not meet the allegation that it was indorsed to the plaintiffs. It may have been indorsed to the plaintiffs and afterward sold and assigned to the other persons. Examine the following cases on this subject: *Lamson v. Falls*, 6 Ind. 309; *Swift v. Ellsworth*, 10 Ind. 205; *Garrison v. Clark*, 11 Ind. 369; *Elder v. Smith*, 16 Ind. 466. Had the defendant denied the indorsement of the note to the plaintiffs, had he alleged the sale and assignment of the note to such other persons before the indorsement to the plaintiffs, or had he pleaded in proper form the non-joinder of the parties interested jointly with the plaintiffs, as indorsees of the note, the question might have been different.

The reasons for a new trial as contained in the written motion, are: Excessive damages. 2. The recovery was for too great an amount. 3. The decision of the court is not sustained by sufficient evidence. 4. The finding is contrary to law. 5. Because the court sustained the motion to strike out the fourth and fifth paragraphs of the answer. 6. Because the court erred in admitting illegal evidence in this cause, over the objection of the defendant, in this, that he admitted John Davis as a witness to give his opinion in relation to a certain indictment non-prossed against Henry V. Clinton, and in permitting said witness to give his opinion,

that a certain suit then pending in the Madison court of common pleas against said Henry V. Clinton and the defendant to this action, Berryman Shafer, could have been sustained.

1 and 2. The amount of the note on which the action was brought is two thousand dollars. It is dated February 2d, 1868, at one day after date. The judgment was rendered on the 24th day of December, 1869, for twenty-two hundred and twenty dollars. The damages are not excessive.

3 and 4. We have read the evidence attentively, and find that upon the question mainly relied upon by the defendant, it was contradictory to such an extent as to forbid an interference with the result in the circuit court. The main question was, whether the consideration of the note was the abandonment of a prosecution for larceny against one Clinton, or whether it was the settlement and dismissal of a civil action against Clinton and the appellant. If the former was the consideration, then it is insisted by the defendant below, that the consideration of the note was illegal, and the note void, and this was one of the defences set up in the answer. Upon this point the evidence is directly contradictory.

5. The fifth reason why a new trial should have been granted is no cause for granting a new trial in any case. It relates to the pleadings, and not to the trial.

6. The evidence of Judge Davis, to the introduction of which objection was made, is as follows: "I had been Mr. Noland's counsel from the time the money is supposed to have been stolen. I investigated the case closely, to ascertain whether the case could be sustained, but was satisfied that it could not be sustained. But I was satisfied that there was evidence to support Noland's claim to the money and note deposited by Clinton with Noland." The defendant objected to the said statement, on the ground that it was giving the opinion of the witness, and that it was not pertinent to the issue in the cause. The question at issue was, whether the consideration of the note was the dismissal of the criminal prosecution, or whether it was the settlement of the civil

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action. We do not quite see how it could be material to the determination of this question whether the indictment or the civil action was well grounded or not, or could or could not have been sustained. Should we hold that this evidence was improperly admitted with reference to that fact, it would still be left in the same uncertainty as it now is, whether the note was given as the consideration of the dismissal of the one action or the other. We are inclined to regard the evidence as so far immaterial that it could not, whether improperly admitted or not, have the effect to change the result of the trial of the cause, or justify a reversal of the judgment.

The judgment is affirmed, with costs.

W. R. Pierse, H. D. Thompson, and H. Craven, for appellant.

 BRANNON ET AL. v. MAY.

DESCENT.—*Widow.*—*Statute Construed.*—Under section 27 of the statute of descents (1 G. & H. 296), the surviving wife does not take by descent as an heir, but by virtue of her marital relation.

SAME.—*Claim under Unrecorded Deed.*—A widow claiming under an unrecorded deed of conveyance of real estate executed to her husband will hold one-third of the real estate against subsequent purchasers for value who had notice of the unrecorded conveyance to her husband.

CONVEYANCE.—*Resulting Trust.*—If A. receives the money of B. for B.'s use and benefit, the investment of the same in real estate by A. and his taking the deed in his own name will create a resulting trust in favor of B.

SAME.—*Recitals in a Deed.*—*Notice.*—Where recitals in a deed of conveyance of real estate show that the grantor purchased the real estate as the agent of the grantee, and that he held the title in trust for the grantee, and that the grantee recognized and adopted the acts of the grantor as his agent, and gave his assent to the trust, and received the benefits thereof by accepting the deed of the grantor, the grantee is chargeable with any notice or knowledge possessed by the grantor affecting the title to the real estate conveyed.

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| 141 | 537 |
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| 148 | 631 |
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| 154 | 594 |
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| 166 | 255 |
| 166 | 420 |

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NOTICE.—*Principal and Agent.*—*Trustee and Beneficiary.*—Notice to an agent is notice to his principal, and notice to a trustee is notice to his beneficiary.

PRACTICE.—*Motion for Judgment on Special Finding.*—*Motion for New Trial.*
A motion for judgment on special findings, notwithstanding the general verdict, may be made, without losing the right to afterward move for a new trial.

APPEAL from the Marion Common Pleas.

BUSKIRK, J.—This was an action for the partition of certain real estate in the city of Indianapolis, brought by the appellee, Sinah May, who was the widow of Allen May, deceased, against the heirs at law of said Allen May, and Patrick Brannon and his wife Judy, and Michael Brannon, and James Brannon.

During the progress of the cause, the death of James Brannon was suggested; but as his interest in the land, upon his death, devolved upon the other Brannons who were parties, no new parties were made.

The facts in the cause, as gathered from the evidence, are substantially as follows:

On the 25th day of August, 1855, one Alexander Jones, who then owned the land, conveyed the same to Allen May. This deed from Jones to May was not recorded until June 29th, 1860. On the 27th day of February, 1856, Jones conveyed the property to Patrick Brannon, and the deed was recorded within a few days after its execution. The deed from Jones to Patrick Brannon was executed in consideration of the sum of five hundred dollars, which Patrick Brannon had lent to Allen May, and the deed was taken from Jones instead of May, by the procurement of May, in order to avoid any liens upon the property as against May. Patrick Brannon had full notice that the property had been conveyed to May, and that the deed was still in existence and in the possession of May. No consideration passed from Brannon to Jones for the property. The money which Patrick had lent to May belonged to Michael and James Brannon, the two sons of the said Patrick, which had come to them from the estate of their grandmother, and

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which Patrick then had in his hands and held in trust for said Michael and James. The purchase was in reality made for Michael and James, and the deed was inadvertently taken in the name of Patrick. The conveyance from Patrick to Michael and James was made on the 19th of September, 1857. Such conveyance was not based upon any new consideration moving from Michael and James to Patrick, but the sole purpose, as expressed therein, was to vest in them the legal title, they already having the equitable title to such property, the same having been purchased with their money and for their use and benefit.

Allen May died on the 19th day of July, 1860.

On these facts, the jury trying the cause found and the court adjudged, over a motion by the Brannons for a new trial, that the widow, Sinah May, was entitled to an undivided one-third of the premises, Michael Brannon to one-third, and the heirs of James Brannon to one-third.

The Brannons claim the entire property, to the exclusion of the widow. It is not disputed that Michael and James Brannon were purchasers for a valuable consideration. A precedent debt would seem to be a valuable consideration for the conveyance of real estate. *Work v. Brayton*, 5 Ind. 396.

Regarding Michael and James Brannon as such purchasers, the question arising upon the facts is reduced to narrow limits. They claim title through their father, and he through Jones, who, it is conceded, was the owner of the property.

The deeds from Jones to Patrick, and from Patrick to Michael and James, were duly recorded before the deed from Jones to May was recorded. Can the widow, claiming under an unrecorded deed to her husband, hold one-third of the property, as against them?

To answer this question, we must look to the statutory provisions bearing upon it. We have the following provisions in the statute of descents, 1 G. & H. 294, 296:

“Sec. 17. If a husband die testate, or intestate, leaving a widow, one-third of his real estate shall descend to her in

fee simple, free from all demands of creditors: Provided, however, That where the real estate exceeds in value ten thousand dollars, the widow shall have one-fourth only, and where the real estate exceeds twenty thousand dollars, one-fifth only as against creditors."

"Sec. 27. A surviving wife is entitled, except as in sec. 17 excepted, to one-third of all the real estate of which her husband may have been seized in fee simple, at any time during the marriage, and in the conveyance of which she may not have joined, in due form of law; and also of all lands in which her husband had an equitable interest at the time of his death: Provided, That if the husband shall have left a will, the wife may elect to take under the will instead of this or the foregoing provisions of this act."

It is argued by the counsel for the appellants, that, inasmuch as the surviving widow takes one-third of the real estate as heir to her husband, and inasmuch as the husband had no right to the property in question at the time of his death, there was nothing in him for the widow to inherit.

We have held, in the case of *May v. Fletcher*, 40 Ind. 575, that under section 27 of the statute, above quoted, the surviving wife does not take by descent as an heir, but in virtue of her marital relation.

By that section she is entitled to one-third (save as therein excepted) of all the real estate of which her husband was seized in fee simple at any time during the marriage, in the conveyance of which she has not joined, although the husband may have conveyed it, or it may have been sold upon execution against him. The heirs generally of the husband, of course, take nothing in such estate. We are entirely satisfied with the ruling in the above case, and the reasoning by which it is supported.

The fact that the husband did not die seized of the property is no reason why the widow may not take the interest claimed by her.

If Michael and James Brannon are not purchasers for

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value and without notice of the conveyance from Jones to May, we are quite clear that the widow's claim is valid, against them. If Michael and James are not protected by reason of being purchasers for value and without notice, the case is very similar to that of *Sutton v. Fervis*, 31 Ind. 265.

We proceed to inquire whether Michael and James Brannon are purchasers for value and without notice of the conveyance from Jones to May.

We have the following statute:

"No conveyance of any real estate in fee simple, or for life, or of any future estate, and no lease for more than three years from the making thereof, shall be valid and effectual against any person other than the grantor, his heirs and devisees, and persons having notice thereof, unless it is made by deed recorded within the time and in the manner provided in this act." Sec. 11, 1 G. & H. 259.

Section 16 of said act provides, that "every conveyance or mortgage of lands, or of any interest therein, and every lease for more than three years, shall be recorded in the recorder's office of the county where such lands shall be situated; and every such conveyance or lease not so recorded within ninety days from the execution thereof, shall be fraudulent and void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration." 1 G. & H. 260.

It is declared by section 11, above quoted, that a deed of conveyance in fee simple, or for life, or of any future estate, shall be valid and effectual against the grantor, his heirs and devisees and persons having notice thereof, although it may not be recorded within the time and in the manner provided in section 16 of said act. The deed from Jones to May was valid and effectual as against Jones, his heirs, and devisees and persons having notice thereof, although not recorded.

It is provided by section 16 of said act, that such deed was fraudulent and void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration,

unless the same was recorded within ninety days from the execution thereof.

It was held by this court, in *Meni v. Rathbone*, 21 Ind. 454, that "the record of a conveyance, which was not recorded within the period prescribed by law, but was recorded thereafter, would constitute notice to all purchasers after the conveyance was so placed upon the record."

The ruling in the above case was adhered to in the case of *Trisler v. Trisler*, 38 Ind. 282.

It is claimed by counsel for appellants, that Michael and James Brannon were purchasers of the property in dispute for value and without notice that Jones had conveyed it to May.

It is, on the other hand, insisted by counsel for the appellee, that Patrick Brannon took the conveyance from Jones with full knowledge that he had previously conveyed the same to May; that Patrick, in making such purchase and in taking such conveyance, acted as the trustee or agent of Michael and James; that he made the purchase with their means and for their use and benefit; that notice to the agent or trustee is notice to the principal or beneficiaries; that if one assumes to act as agent of another, and causes an act to be done for him of which the latter afterward takes the benefit, he must take it charged with notice of such matters as appear to have been at the time within the knowledge or recollection of the agent.

It was found by the jury, in answer to a special interrogatory submitted to them, that at the time Jones conveyed the property to Patrick Brannon, he had full knowledge that Jones had previously conveyed such property to Allen May.

We proceed to inquire whether Patrick Brannon, in making said purchase and in taking such conveyance, acted as the trustee or agent of Michael and James, and whether such purchase was made with their means and for their use and benefit.

Michael and James Brannon claim title to the property by virtue of the deeds of conveyance from Jones to Patrick.

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and from Patrick to them. These deeds were read in evidence. The deed from Jones to Patrick was in the ordinary form of warranty deeds. The deed from Patrick to Michael and James was as follows:

"Whereas Margaret Sullivan, by her last will and testament, bequeathed to James Brannon and Michael Brannon, the children of Patrick Brannon and Judy Brannon, his wife, and the grandchildren of Margaret Sullivan, the sum of six hundred dollars, which was paid to the said Patrick for the use and benefit of James and Michael; and whereas said sum so received was invested in the purchase of the real estate hereinafter described, and the deed thereto was made to said Patrick, instead of the said James and Michael;

"Now, therefore, to the end that said property shall be held by said James and Michael, to whom the same property belongs, the said Patrick Brannon and Judy Brannon, his wife, residing in the county of Marion and State of Indiana, in consideration of the above recited facts, do hereby convey and warrant to the said James Brannon and Michael Brannon and their heirs and assigns forever, the above mentioned real estate, which is situated in the county of Marion and State of Indiana, and is particularly described as follows, to wit: The west half of lot number twenty-six (26) as marked and described on Samuel Henderson's recorded plat of his addition to the city of Indianapolis, being a part of the east half of the north-east quarter of section thirty-five (35), township sixteen, north of range three east,—said part of said lot hereby conveyed containing one acre, more or less.

"In witness whereof, the said Patrick Brannon and Judy Brannon, his wife, have hereunto set their hands and seals this nineteenth day of September, A. D. 1857.

his
"Patrick X Brannon, [SEAL]
mark.

her
"Judy X Brannon, [SEAL]
mark.

"Witness, C. C. Hines."

The above deed was duly acknowledged and recorded.

The receipt of the money of James and Michael Brannon by Patrick, for their use and benefit, his investment of the same in the property in dispute and his taking the deed in his own name, created a resulting trust in their favor. Mr. Story says:

“The most simple form, perhaps, in which such an implied trust can be presented, is that of money, or other property, delivered by one person to another, to be by the latter paid or delivered over to and for the benefit of a third person. In such a case the party so receiving the money, or other property, holds it upon a trust; a trust necessarily implied from the nature of the transaction, in favor of such beneficiary, although no express agreement has been entered into, to that effect.”

He proceeds to say, however, that “the trust is not, under all circumstances, absolute; for if the trust is purely voluntary, and without any consideration, and the beneficiary has not become a party to it by his express assent after notice of it, it is revocable; and if revoked, then the original trust is gone, and an implied trust results in favor of the party who originally created it.” Story Eq. Jur., sec. 1196, and authorities there cited.

In the case in judgment, James and Michael became parties to it by their express assent, for they recognized Patrick as their trustee or agent and received the benefits of such trust.

It is settled that if one assume to act as the agent of another, and cause an act to be done for him of which the latter afterward takes the benefit, he must take it charged with notice of such matters as appear to have been at the time within the knowledge and recollection of the agent. *Hovey v. Blanchard*, 13 N. H. 145; *Hicrn v. Mill*, 13 Ves. 120; *Jennings v. Moore*, 2 Vern. 609; *Brotherton v. Hatt*, 2 Vern. 574; 2 Livermore Agency, 236-7; Story Agency, sec. 131.

James and Michael Brannon claim title under and by virtue of the deed from Patrick to them. There are certain

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recitals of facts in such deed. They are, that Patrick received six hundred dollars which belonged to James and Michael; that he invested the same in the purchase of the premises in controversy and took the conveyance in his own name, when the property properly and really belonged to them; and that the conveyance was made for the purpose of vesting in them the legal title, they being the equitable owners thereof.

Are such recitals binding and conclusive upon James and Michael and their privies in blood and estate? Herman Estoppel, 251, says:

“In regard to recitals in deeds, all parties to a deed are bound by the recitals therein, which operate as an estoppel, working on the interest of the land; if it be a deed of conveyance, binding both parties and privies, privies in blood, privies in estate, and privies in law. Between such parties and privies the deed or other matter recited need not at any time be otherwise proved. The recital of it in the subsequent deed being conclusive. It is such conclusive evidence that it can not be averred against, and which forms a muniment of title.” See Bigelow Estoppel, from page 295 to 318, and authorities there cited.

It was held by this court, in *Wiseman v. Hutchinson*, 20 Ind. 40, that where a subsequent purchaser might learn the existence of a vendor's lien by examining the title deeds which constitute necessary links in the chain of his own title, he will be chargeable with notice of the existence of such lien, although he may not have actually examined those deeds, and they may not have been recorded.

It is well settled by the authorities referred to in the note to the above case, that the purchaser of real estate is presumed to have examined the deeds necessary to make out his chain of title, and under which he claims, and is bound by the recitals in such deeds. See also 2 White & T. Lead. Cas. 132, and the numerous cases there referred to.

If a purchaser is bound by the recitals in the prior deeds which constitute his chain of title and under which he claims,

surely it will not be controverted that he is bound by the recitals in a deed to himself.

The recitals in the deed from Patrick to James and Michael conclusively show that Patrick acted as their agent in the purchase of the property, and that he held the same in trust for them, and that they recognized and adopted his acts as their agent, gave their express assent to the trust, and received the benefits thereof.

It remains to inquire whether notice to an agent or trustee is notice to the principal or the beneficiary.

It is well and firmly settled by the whole weight and current of authorities, that notice to an agent is notice to the principal, and that notice to a trustee is notice to the beneficiary, and in support of this proposition we refer to the following elementary works and adjudged cases:

Story Eq. Jur., sec. 408; Adams Eq. 157; Sugden Vendors, 756; 3 Washb. Real Property, 283; 2 White & T. Lead. Cas. 163; *Myers v. Ross*, 3 Head, 59; *Hough v. Richardson*, 3 Story, 659; *Bracken v. Miller*, 4 Watts & S. 102; *Astor v. Wells*, 4 Wheat. 466; *Howey v. Blanchard*, 13 N.H. 145; *Barnes v. M'Clinton*, 3 Penn. 67; *Jackson v. Sharp*, 9 Johns. 163; *Jackson v. Winslow*, 9 Cow. 13; *Jackson v. Leek*, 19 Wend. 339; *Westervelt v. Haff*, 2 Sandf. Ch. 98; *Griffith v. Griffith*, 9 Paige, 315; *Blair v. Owles*, 1 Munf. 38; *The Bank of the U.S. v. Davis*, 2 Hill N. Y. 451; *Watson v. Wells*, 5 Conn. 468; *Lessee of Henry v. Morgan*, 2 Binn. 497; *Ross v. Houston*, 25 Miss. 591.

It is said in *Jackson v. Sharp*, *supra*, that "there is no doubt that if a subsequent purchaser has notice, at the time of his purchase, of a prior unregistered deed, it is the same to him as if it had been registered. It is not a secret conveyance by which he can be prejudiced or defrauded; and if he purchases with knowledge of such prior deed, and with the expectation of getting his deed first registered, he does an act against good conscience, and in abuse of the statute, which was made to prevent, and not to protect, fraud. It is,

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therefore, a well settled principle, that such notice supplies the place of a prior registry."

We therefore hold that Mrs. May is the owner in fee simple of one-third of the said premises, and that the court committed no error in overruling the motion for a new trial.

There were answers of the jury to particular questions of fact propounded to them, and before moving for a new trial, the appellants moved for judgment in their favor on the special findings, which motion was overruled. The counsel for appellee claim that the motion first made cut off the motion for a new trial. Several authorities are cited to show that a motion in arrest of judgment cuts off a motion for a new trial ; but we are not aware of any holding that a motion for judgment in one's favor on the special finding of the jury works such a result. We think where there is a general verdict with special findings by the jury in answer to questions propounded to them, the party against whom the general verdict is returned may move for judgment in his favor on the special findings, notwithstanding the general verdict, without losing his right to move for a new trial in case his motion for judgment should be overruled. The doctrine that a motion in arrest of judgment cuts off a motion for a new trial, though well settled in this State, is somewhat technical, and we are not disposed to extend it to cases of motions like that under consideration.

The judgment is affirmed, with costs.

J. Hanna and *F. Knefler*, for appellants.

L. Barbour and *C. P. Jacobs*, for appellee.

LUCAS v. SMITH ET AL.

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EVIDENCE.—*Execution of Written Instrument.*—By failing to deny under oath the execution of a written instrument, which is the foundation of a suit, and a copy of which is filed with the complaint, proof of its execution is dispensed with, but it is incumbent on the plaintiff to produce, on the trial, and give in evidence, the instrument described in the complaint, to entitle the plaintiff to recover.

VARIANCE AND AMENDMENT.—Where an instrument of writing sued upon is described in the complaint as a contract to pay one hundred dollars, and the contract produced at the trial, and given in evidence, is an agreement to pay one dollar, the complaint will be considered, in the Supreme Court, as amended so as to conform to the proof.

SAME.—*Judgment.*—Where a complaint is upon a contract, described as an agreement to pay one hundred dollars, and there is no averment of any mistake as to the amount agreed to be paid, or any evidence other than the contract, and the contract in evidence is an agreement to pay one dollar, it is error to render judgment for an amount exceeding the sum named in the contract.

APPEAL from the Fountain Circuit Court.

OSBORN, C. J.—This was an action brought by the appellees upon a subscription made by the appellant to a railroad company for one hundred dollars, assigned to the appellees.

An answer of general denial was filed. The cause was tried by the court, finding for the appellees, motion for a new trial overruled, exceptions and final judgment for the appellees on the finding.

The motion for a new trial assigns, as causes therefor, the admission of a subscription for one dollar; that the assessment of damages was too large; and that the finding was not sustained by the evidence.

The error assigned is in overruling the motion for a new trial.

The complaint charges that the defendant below, the appellant, agreed, in writing, to pay The Indianapolis, Crawfordsville, and Danville Railroad Company, one hundred dollars, when the road should be completed and in running order from Indianapolis to Covington, Indiana; that the road was completed between those points; that the subscription had been assigned to the plaintiffs below, the appellees;

Lucas v. Smith *et al.*

alleges the non-payment of the money, and demands judgment. A copy of the subscription was filed with, and made a part of, the complaint.

On the trial, a paper was offered in evidence, of which the following is a copy :

"We, the subscribers, citizens of Fountain county, Indiana, promise to pay The Indianapolis, Crawfordsville, and Danville Railroad Company, without relief from valuation or appraisement laws, the sums set opposite our respective names, for the purpose of aiding and assisting said company in the construction of a railroad from Indianapolis to Danville, Illinois, upon the condition, to wit, that these subscriptions shall not be due or payable until said railroad is completed and in running order from Indianapolis to the town of Covington, Indiana.

"Witness our hands this 14th day of May, 1867.

"L. A. LUCAS, - - \$1.00"

The appellant objected to its introduction, on the ground of a variance in amount from the one set out in the complaint and the copy filed. The objection was overruled, and the subscription was read in evidence. It was also proved that the subscription was assigned to the appellee, and that the railroad was completed to Covington on the first day of September, 1870. The court found for the appellee one hundred and six dollars.

The appellees seek to sustain the action of the court on the ground that the appellant, by failing to deny the execution of the subscription on oath, could not deny that it was for the amount stated in the copy filed with the complaint. They rely upon sec. 80, 2 G. & H. 105, which provides: "Where a writing, purporting to have been executed by one of the parties, is the foundation of, or referred to in any pleading, it may be read in evidence on the trial of the cause against such party, without proving its execution, unless its execution be denied by affidavit before the commencement of the trial, or unless denied by a pleading under oath." By failing to deny the execution of the instrument,

proof of it was dispensed with. Still it was incumbent upon the plaintiffs to produce on the trial, and give in evidence, the paper described in the complaint, to entitle them to a recovery. *Howard v. Kisling*, 15 Ind. 83.

If there was a variance between the contract described in the complaint, and the one produced on the trial, it could not have been introduced, except for the statutes on the subject of variance, amendments, and appeals.

"No variance between the allegations in a pleading and the proof, is to be deemed material, unless it have actually misled the adverse party to his prejudice in maintaining his action or defence upon the merits." Sec. 94, 2 G. & H. 114. The court may at any time direct any material allegations to be inserted, struck out, or modified to conform the pleadings to the facts proved. Sec. 99, p. 118. "No judgment shall be stayed or reversed, in whole or in part, by the Supreme Court for any defect in form, variance or imperfections, contained in the record, pleadings, process, entries, returns, or other proceedings therein, which by law might be amended by the court below; but such defects shall be deemed to be amended in the Supreme Court." Sec. 530, p. 278.

This court has held in all such cases, that the amendment will be considered as made, and the variance avoided. The court committed no error in receiving the paper. If the subscription was for one dollar, the complaint will be considered as amended to conform it to the proof. As thus amended, the subscription would be the one described in the complaint. If the defendant was misled to his prejudice by the variance, he might have proved it to the satisfaction of the court, and shown in what respect he was misled, and the amendment could have been made only upon terms to be fixed by the court. Otherwise, the amendment will be deemed to have been made. Secs. 99 and 530, *supra*.

The subscription, as set out in the bill of exceptions, is for one dollar. There is no averment in the complaint of any mistake or any evidence relative to the amount sub-

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scribed, except the subscription itself. It was for one dollar, and not one hundred dollars as claimed by the appellees.

The finding of the court was for too much, and a new trial ought to have been granted.

The judgment of the said Fountain Circuit Court is reversed, with costs; cause remanded, with instructions to grant a new trial, and for further proceedings not inconsistent with this opinion.

W. H. Mallory, for appellant.

S. C. Willson, for appellees.

NEWMAN ET AL. v. SYLVESTER.

CITY.—Territorial Limits.—The territorial limits of the city of Indianapolis are fixed and described by public law and public records open to all.

SAME.—Ordinance for Street Improvement.—Contractor.—The action of the common council of a city in passing an ordinance for the improvement of a street, and proceedings under it in letting a contract, cannot be said to throw the person making such contract off his guard in making inquiry as to whether or not the street proposed to be improved is within the corporate limits of the city.

PRINCIPAL AND AGENT.—Liability of Agent.—One assuming to act as agent for another without authority does not necessarily render himself liable. It is when he knowingly or carelessly assumes to act without being authorized, or conceals the true state of his authority, and falsely leads the party with whom he contracts to repose in his authority, that he may be liable.

SAME.—If one enters into a contract in the name of another and as his agent, and does it honestly, fully disclosing all the facts touching the authority under which he acts, so that the one contracted with, from such information or otherwise, is fully informed of the authority possessed or claimed, the agent is not liable on the ground of deceit or for misleading the other party.

SAME.—It is material in such case that the party complaining of a want of authority in the agent should be ignorant of the truth touching the agency. If he has full knowledge of the facts, or of such facts as fairly and fully put him upon inquiry, and he fails to avail himself of such knowledge, or the means of knowledge reasonably accessible, he cannot, in the absence of fraud, say that he was misled, simply on the ground that the party assumed to act as agent without authority.

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SAME.—Public Officer.—If a party contracts as a public officer, and in that capacity acts honestly, he will not ordinarily be personally liable. If his authority to act is defined by public statute, all who contract with him will be presumed to know the extent of his authority, and cannot allege their ignorance as a ground for charging him with acting in excess of such authority, unless he knowingly mislead the other party.

SAME.—Members of Common Council.—Contractor.—If the members of the common council of a city, in passing an ordinance and letting a contract for the improvement of a street, act in good faith, under a misapprehension, they and the contractor, as well as the adjacent owner of real estate, believing the street to be within the corporate limits of the city, the contractor having like knowledge with the members of the council, they cannot be held liable for the cost of such improvement, though the place where the same is made is not within the corporate limits.

APPEAL from the Marion Superior Court.

OSBORN, C. J.—The appellee sued the appellants and four others in the Superior Court. It is not necessary to notice the proceedings against the others, as final judgment has been rendered for them and no cross errors have been assigned by the appellee.

The appellants demurred to the complaint. The demurrer was overruled. They then filed an answer, to which a demurrer was sustained, and final judgment was rendered against them for \$359.04. They appealed to the general term, where the judgment was affirmed. Proper exceptions were taken and errors assigned, and the questions arising on the pleadings are fairly before us.

The complaint alleges that the defendants, members of the common council of the city of Indianapolis, passed "an ordinance to provide for grading and gravelling Market street from the old corporation line to Hyland Street, including sidewalks," under sections 68 to 71 inclusive, of the city charter; that the city engineer in pursuance of the directions of the ordinance, set the grade stakes for the improvement; that the clerk advertised for bids for the work; that the plaintiff submitted a sealed proposal to make the improvement, and entered into a contract for the completion of it, to the entire satisfaction of the city engineer; that he did the work pursuant to the requirements of the ordinance and

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contract; that an estimate was made and allowed against a lot owned by Mary E. Noble, for \$348.54, which was allowed by the common council and adopted as the estimate of the council, and the owner of the lot required to pay it; that the work was of the value of the amount so estimated and allowed; that the owner refused to pay, and still refuses, denying all liability therefor, or that the lot is liable; that he filed an affidavit with the clerk of the city containing all the allegations required in such cases for that purpose, and demanded a precept; that the mayor and council ordered one, but afterward ordered it to be returned and withdrawn and refused to order another, on the ground that the lot was not within the limits and jurisdiction of the city.

“That at the time of the passage of said ordinance, the advertising to receive proposals for said work, and the receiving of the same and contracting for said work, the defendants, the mayor and members of the common council of the city of Indianapolis, by so doing, held forth and declared and affirmed that they had full power and authority and jurisdiction of and over said part of said Market street, and that the same and said premises of Mary E. Noble, and the premises of all others owning lots of land bordering on said part of said street, were within the limits and jurisdiction of said city, and subject to the jurisdiction and control of the common council thereof, when they knew that it was not, and thereby intended to and did deceive; and that the plaintiff had no knowledge to the contrary, and believed they had, and by such action was thrown off his guard and prevented from making inquiry. But that since said work was done and finished under said contract, and the withdrawal of said precept, and the refusal to issue another, he has ascertained that the said part of said street and said lot of Mary E. Noble had not been annexed to and within the limits and jurisdiction of said city of Indianapolis; but he avers that said Market street west of said old corporation line had been, ever since the incorporation of said city, and was, at the time of the passage of said ordinance and letting

and making of said contract, a street of and within said city of Indianapolis; and that said part of said street east of said old corporation line to said Hyland street so ordered and contracted to be improved, had been for fifteen years prior to said ordinance and contract, and was at the time a continuation of said Market street, called by that name and used, and he believed the same was a street of said city and within the limits and jurisdiction of said city and council."

After the demurrer to the complaint had been overruled, the appellants filed an answer stating that they were, at the time of the passage of the ordinance and the letting of the contract, members of the common council of the city of Indianapolis, and voted for the passage of said ordinance, and to approve and confirm the letting of said contract to the plaintiff; that they voted for the passage of said ordinance, and to approve and confirm the letting of said contract to the plaintiff, by mistake, and without fraud or intentional wrong, and under a misapprehension as to the locality of so much of said Market street as it was proposed to improve; that they and said plaintiffs, and the owners of the lots or land fronting thereon at the time of the passage of said ordinance and the letting of said contract, and during all the time the plaintiff was engaged in improving said street, under said contract, believed that that portion of said Market street lying between the old corporation line and Hyland street, was within the corporate limits of said city of Indianapolis; that the plaintiff had like knowledge thereof with these defendants; that these defendants acted in the premises in good faith, as members of said common council, without any intention whatever of defrauding the plaintiff.

The action is sought to be maintained upon the theory that the members of the common council, while acting in an official capacity and in voting for an ordinance to grade and gravel a street, and in causing the work to be done, were acting as mere agents, and governed by the same rules and regulations and liable to the same extent as ordinary agents,

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acting as such for private persons; and that when one assumes to contract for another, with one who has an equal opportunity with himself to know the extent of his authority, and to whom no representation is made as to his power to act, and from whom nothing is concealed, if in fact he had no authority to bind his principal, he is liable to the party contracted with, either upon the contract or for deceit.

It is not alleged in the complaint that the appellant made any representations that the street to be improved was within the city. In fact, the allegation precludes any such presumption. It says, that by the act of passing the ordinance, and the proceedings under it, they held forth, etc., that they had authority and jurisdiction over the street, and that the same and the lot described were within the city limits, when they knew they were not. It is not alleged that they did anything to prevent him from examining the record, or making any other examination or investigation, to ascertain whether the part of the street to be improved and the lot were within the city. The complaint may be regarded as admitting that he made no inquiry on the subject. It says that the action of the common council threw him off his guard and prevented him from making inquiry. It also alleges that that part of the street ordered to be improved was at the time, and had been for fifteen years, a continuation of Market street from the city, called by that name, and used, and he believed the same was a street of said city, and within the limits and jurisdiction of the city and council. The only reason given for not making inquiry was, that they proposed to have the street graded. "By such action he was thrown off his guard and prevented from making inquiry," is the averment on that subject.

The territorial limits were fixed and prescribed by public law and public records, open to all. The original charter, in which the limits were defined, was an act of the general assembly. All extension or annexation has been by public proceedings. An examination of such proceedings by the

appellee would have shown him that the street, where the work was proposed to be done, was not in the city. We do not see how the action of the common council, in passing the ordinance and the proceedings under it, could throw the appellee off his guard or prevent him from making inquiry about the city limits. On the contrary, it seems to us, that prudence would dictate to him to make inquiry on that subject, unless he was satisfied that the street was within the city, before he would undertake to make such an improvement and look to the property owners for his pay. By the action of the appellants as members of the common council, he was informed that the street proposed to be improved was located at a given point, and his attention was directed to that point; that they assumed to act, as public officers under a public law, to which his attention was directed; and that he must look to the property bordering on the street for his pay, and to that alone. It was not expressly stated that the street was within the city. The most that can be said is, that they acted as if they believed it to be. The appellants neither said nor did anything calculated to mislead the appellee or prevent him from ascertaining whether the place where the work was to be done was within the limits or jurisdiction of the city. If duty required that they should know that the common council had authority to do the work before ordering it to be done, prudence required the same from him before he undertook to do it.

The contractor made his contract with express reference to the source from which he was to receive payment. *Richardson v. City of Brooklyn*, 34 Barb. 569; *The City of New Albany v. Sweeney*, 13 Ind. 245; *Johnson v. The Common Council of the City of Indianapolis*, 16 Ind. 227.

It is said, however, that if one undertakes to act as the agent for another, *bona fide*, believing that he has due authority, but in fact has not authority, and therefore acts under an innocent mistake, he is held by law to be equally as reprehensible as if he knew he had no authority. Story on Agency, and other authorities, are relied upon to

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sustain that proposition. Story Agency, sec. 264. The reason given is, that every person so acting for another, by a natural, if not a necessary, implication, holds himself out as having competent authority to do the act, and thereby draws the other into a reciprocal engagement; that the signature of the agent amounts to an affirmation that he has authority to do the particular act. In sec. 265 the same author says: "But circumstances may arise, in which the agent would not, or might not, be held to be personally liable, if he acted without authority, if that want of authority was known to both parties, or unknown to both parties." So in *Smout v. Ilbery*, 10 Meeson & Welsby, 1, ALDERSON, B., after recognizing the same doctrine, on p. 10 says: "And if that wrong produces injury to a third person, who is wholly ignorant of the grounds on which such belief of the supposed agent is founded, and who has relied on the correctness of his assertion, it is equally just that he who makes such assertion should be personally liable for its consequences." The conclusion in that case was, that in all the cases when one acting as agent without authority has been held liable, it would be found that he had been guilty of some fraud, had made some statement which he knew to be false, or had stated as true what he did not know to be true, omitting at the same time to give such information to the other party as would enable him, equally with himself, to judge as to the authority under which he proposed to act.

One assuming to act as agent for another without authority does not necessarily render himself liable. It is when he knowingly or carelessly assumes to act without being authorized, or conceals the true state of his authority, and falsely leads the party with whom he thus contracts to repose in his authority, that he may be liable. *Ogden v. Raymond*, 22 Conn. 379; *Walker v. The Bank of the State of N. Y.*, 9 N.Y. 582; *Jefts v. York*, 10 Cush. 392; and many other authorities. If he enter into the contract in the name and as the agent of another, and does it honestly, fully disclosing all the facts touching the authority under which he acts, so that the one

contracted with, from such information or otherwise, is fully informed of the authority possessed or claimed by him, he is not liable on the ground of deceit or for misleading the other party. It is material in such cases that the party complaining of a want of authority in the agent should be ignorant of the truth touching the agency. If he has a full knowledge of the facts, or of such facts as fairly and fully put him upon inquiry for them, and he fails to avail himself of such knowledge, or the means of knowledge reasonably accessible to him, he cannot say that he was misled, simply on the ground that the party assumed to act as agent without authority, in the absence of fraud.

If the party contracts as a public officer, and in that capacity acts honestly, he will not ordinarily be personally liable. *Belknap v. Reinhart*, 2 Wend. 375; *Hodgson v. Dexter*, 1 Cranch, 345; *Nichols v. Moody*, 22 Barb. 611; and cases cited. If his authority to act is defined by public statute, all who contract with him will be presumed to know the extent of his authority, and cannot allege their ignorance as a ground for charging him with acting in excess of such authority, unless he knowingly misled the other party.

The conclusions which we have announced, we think, are fairly deducible from the authorities.

We are satisfied that the demurrer to the complaint ought to have been sustained, unless the allegation that the appellants knew that the part of the street ordered to be improved was not within the city limits makes it good. That allegation must be considered with others connected with it. The averment as to what was affirmed and declared by the common council by their acts is not the averment of a fact. But after stating, as a conclusion or inference from what they had done, that they affirmed that the street and lot were within the limits and jurisdiction of the city and subject to the control of its common council, it is averred that "they knew it was not, and thereby intended to and did deceive; and that the plaintiff had no knowledge to the contrary."

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and believed they had." The sentence seems to be incomplete. It is doubtful if it fully expresses the meaning of the pleader. The averment is, that, whilst he had no knowledge that the place where the improvement was to be made was not in the city, he believed they had. If that is what he really meant, then it is inconsistent with the averment of his own ignorance. If he believed that the appellants had knowledge that the place was without the city, he could not be ignorant of that fact. We cannot understand how one can rely upon his ignorance of a fact, when he believes that another, with whom he is dealing, has knowledge of its existence. The most favorable construction which can be put upon the allegation is, that the appellee had no knowledge that the place was without the city, and that he believed that they had knowledge that it was within it. But it is not very clearly stated. After stating that, since the work was done, he had ascertained that the place was not in the city; that Market street 'west of the old corporation line, had been ever since the incorporation of the city one of its streets; and after stating that the part of the street where the work was done was a continuation of Market street east of the old corporation line, it averred that it was called by that name and had been used as such for fifteen years, and he believed that it was a street within the limits of the city.

It is difficult for us to determine whether he relied most upon his knowledge of the existence of that street for fifteen years, or the acts of the common council for its improvement.

The answer alleges that the appellants acted as members of the common council; that they acted in good faith, under a misapprehension as to the locality of the part of the street to be improved; that they, the appellee and the owner of the lot believed that it was within the corporate limits of the city; that the appellee had like knowledge with the appellants. The facts alleged in the answer constituted a bar to the action, and the demurrer ought to have been overruled.

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The following are some of the authorities not before cited, bearing in a greater or less degree upon the questions involved in the case: *Hall v. Lauderdale*, 46 N. Y. 70; *Creighton v. The City of Toledo*, 18 Ohio St. 447; *Loudon v. Robertson*, 5 Blackf. 276; *Port v. Williams*, 6 Ind. 219; *Boyd v. Doty*, 8 Ind. 370; *Stackhouse v. The City of Lafayette*, 26 Ind. 17; *Baker v. The State*, 27 Ind. 485; *Wilson v. Hunter*, 30 Ind. 466; *Case v. Bumstead*, 24 Ind. 429; *Morgan v. Fencher*, 1 Blackf. 10; *Clark v. The City of Des Moines*, 19 Iowa, 199; *Boardman v. Hayne*, 29 Iowa, 339; Story Agency, sec. 265; *Long v. Colburn*, 11 Mass. 97; 1 Parsons Con. 66-67; Angell & Ames Cor., sec. 303; *Potts v. Henderson*, 2 Ind. 327; *M'Henry v. Duffield*, 7 Blackf. 41; *Fletcher v. Heath*, 11 Wend. 477; *Ballou v. Talbot*, 16 Mass. 461; Story Agency, secs. 319-20.

The judgment of said Superior Court of Marion county is reversed, at the costs of the appellee. Cause remanded, with instructions to reverse the judgment of the special term, and to instruct the special term to overrule the demurrer to the appellants' answer, and proceed in the cause in accordance with this opinion.

J. S. Harvey and *B. K. Elliott*, for appellants.

N. B. Taylor and *E. Taylor*, for appellee.

THE FIRST PRESBYTERIAN CHURCH v. THE CITY OF
LAFAYETTE.

CITY.—Appeal from Precept.—Parties.—On an appeal from a precept issued to enforce the collection of an assessment for the improvement of a street, the contractor who did the work, and for whose benefit the precept issued, is the proper party plaintiff.

SAME.—Appeal Bond.—The appeal bond in such case should be made payable to the contractor, and not to the city.

SAME.—Judgment.—Amendment.—Complaint.—Where, in such an action, the city appears as the party plaintiff, and the cause is allowed to proceed to final

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judgment without objection, and the court in the judgment orders the money when collected to be paid to the contractor, the judgment will be substantially a judgment in favor of the contractor, and the Supreme Court will deem the complaint to have been amended by making him the plaintiff.

JUDGMENT.—*Objections to Judgment.*—Where no objection has been made in the court below to the form of a judgment, objections first made in the Supreme Court will not prevail.

APPEAL from the Tippecanoe Common Pleas.

WORDEN, J. — The city of Lafayette, by her common council, directed a certain street improvement to be made.

The contract was let to P. S. Underhill, who did the work in accordance therewith, and a final assessment was made in his favor upon the property holders adjoining the street. The appellant was assessed \$462.10 for the east half of lot 128, being 77 feet upon the street. The assessment to the appellant was made in the following abbreviated name, viz.: "First Pres. Ch."

The assessment not being paid, a precept was duly issued against the appellant, from which she took an appeal to the court of common pleas. The appeal bond entered into by the appellant was made payable to the city of Lafayette, instead of Underhill, the contractor. No objection, however, appears to have been made on this ground, and the cause was docketed in the name of the City of Lafayette, as plaintiff, against The First Presbyterian Church, as defendant.

The appellant herein appeared in the court below and submitted to a rule to answer, and after the continuance of the cause for several terms, finally declined to answer, and judgment was taken against her for want of such answer. The judgment directs the sale of the "east end," instead of the "east half," of the lot described, for the payment of the assessment, and directs further, that the money when collected be paid to P. S. Underhill, the contractor who did the work.

No objection or exception whatever was taken to any of the proceedings below. The appellant, however, prayed an appeal to this court, which was granted; and she has assigned the following errors.

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“ 1st. The appellee has no interest whatever in the subject-matter of the suit, and is not the real party in interest, and no judgment should have been rendered in her favor.

“ 2d. The complaint does not state facts sufficient to entitle the appellee to the relief demanded, and the said court erred in rendering judgment thereon.

“ 3d. The judgment rendered by the court is illegal and void, because the record thereof contains no sufficient description of any property subject to be affected thereby.”

The first and second errors assigned may be considered together, as they raise substantially the same question. Doubtless the complaint does not state facts sufficient to entitle the city to recover, nor is she the real party in interest. The contractor, Underhill, who did the work, in whose name as contractor and for whose benefit the precept issued, was undoubtedly the proper party plaintiff, and he should have been named as such upon the record. Excepting the abbreviated name in which the assessment was made, in which we see nothing objectionable, and the assumed insufficiency in the description of the part of the lot, it is not claimed that the facts alleged in the record are not sufficient to entitle the contractor to maintain the action. We are led to inquire how it came that the cause was docketed and tried in the name of the city of Lafayette as plaintiff, instead of the contractor, as far as we can do so from the record.

The appeal bond entered into on the appeal from the precept was made payable to the city of Lafayette. This was wrong. It should have been made payable to the contractor in whose favor the precept issued. Thus it will be seen that the first wrong step was taken by the appellant herein. The appeal might have been dismissed unless a proper bond had been filed. The cause was then docketed as between the parties indicated by the appeal bond. We suppose that neither the parties nor the court considered the question whether the city or the contractor should be named as the party plaintiff, as no question in that respect was made in the court below. Had a demurrer been filed pointing out

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that the city was not a proper party plaintiff, or that the record of the proceedings of the common council which constituted the complaint did not state facts sufficient, etc., the objection could easily have been obviated by docketing the cause in the name of the contractor as plaintiff, which would doubtless have been done in the first instance had the appeal bond been made payable to him. Nothing of this kind was done, however, and the cause was allowed to proceed to final judgment, without objection of any kind, in the name of the city as plaintiff.

The court, in the final judgment, as we have seen, ordered the money when collected to be paid to Underhill, the contractor. This rendered the judgment substantially a judgment in his favor, though nominally in favor of the city. The entitling of the cause could have been amended at any time during the pendency of the proceedings, so as to have made Underhill the nominal as well as the real plaintiff. We deem the amendment to have been made. The following statutory provision precludes a reversal of the judgment by reason of anything specified in the first or second assignments of error :

“No judgment shall be stayed or reversed, in whole or in part, by the Supreme Court for any defect in form, variance or imperfections, contained in the record, pleadings, process, entries, returns, or other proceedings therein, which by law might be amended by the court below ; but such defects shall be deemed to be amended in the Supreme Court ; nor shall any judgment be stayed or reversed, in whole or in part, where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below.” 2 G. & H. 278, sec. 580.

There is nothing in the third assignment of error. The property is clearly and amply described in the assessment. It is described as the east half of lot 128, with 77 feet bordering on the street. We may perhaps infer that the lot lies lengthwise with the street, as the judgment directs the sale of the east end of the lot instead of the east half

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thereof. Without intimating any opinion whether the description of the premises in the judgment would be sufficient or otherwise, we are of opinion that no objection to the judgment can be made here for the first time. Objection should have been made to the judgment in the court below; and not having been made there, it cannot prevail here. *Miles v. Buchanan*, 36 Ind. 490.

The judgment below is affirmed, with costs.

R. P. Davidson, for appellant.

**THE CLEVELAND, COLUMBUS, CINCINNATI, AND INDIANAPOLIS
RAILROAD CO. *v.* SWIFT.**

RAILROAD.—*Injury to Animals.*—*Fence.*—*Negligence.*—Where, in an action against a railroad company for killing stock, it appeared that the railroad had been fenced, but a panel of the fence had been cut out and made into the form of a gate, but not hung on hinges, and the opening was used by persons hauling wood and placing it near the railroad track, and this was done with the consent of the railroad company, or without objection from it, a sub-tenant of the plaintiff being one of the persons hauling wood, and while he was so hauling, the gate was so set up that hogs of the plaintiff passed through the opening and upon the railroad, and were killed;

Held, that these facts did not show such negligence on the part of the plaintiff as to prevent his recovery.

SAME.—If a railroad company allow an opening to be made in the fence inclosing its road and left insecure, it cannot be said that the road is securely fenced; and if animals pass through the same and upon the railroad, and are killed, the company is liable without proof of negligence on the part of the company.

APPEAL from the Delaware Circuit Court.

DOWNEY, J.—This was an action commenced before a justice of the peace, by the appellee against the appellant, to recover the value of certain hogs which had been killed by the cars of the company on its road. On appeal from the judgment before the justice of the peace, in the circuit court, the appellant demurred to the evidence of the plaintiff, and

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the demurrer was overruled, to which the company excepted. Final judgment was rendered upon the demurrer for the plaintiff, the defendant appealed, and has assigned as error the overruling of the demurrer. It appears from the evidence that there was a fence built by the company at the place where the hogs went upon the road, but a panel had been cut out and made into the form of a gate, but was not hung on hinges. This opening was used by several persons for the purpose of hauling wood through and placing it near to the railroad. This seems to have been done with the assent, or at least without any objection from the company. The plaintiff had rented his ground adjoining the road to one Darrow, and he had rented it to one Koons, who was one of those who hauled wood through the opening in the fence. While he was thus hauling, the gate was so set up at the opening that the hogs got upon the road by passing in at the sides of the gate. It is claimed that this shows such negligence on the part of the plaintiff that he should not be allowed to recover. We do not think so. The evidence does not connect the plaintiff with the making of the opening in the fence or with the manner in which it was kept. If the railroad company allow an opening to be made in the fence and left insecure, it cannot any longer be said that the road is securely fenced, and the company is, by the statute, liable for the animals killed, without any proof of negligence on the part of the company. 3 Ind. Stat. 415, sec. 5.

The judgment is affirmed, with costs.

J. A. Harrison, for appellant.

R. S. Gregory and *J. N. Templer*, for appellee.

PARSONS v. STOCKBRIDGE ET AL.

ATTACHMENT.—*Affidavit in the Alternative.*—An objection to an affidavit in attachment, for being in the alternative, does not lie, when the disjunctive *or* is used, not to connect two distinct facts of different natures, but to characterize and include two or more phases of the same fact, attended with the same results.

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SAME.—*Conveying Property by Debtor.—Evidence.*—A promise by a debtor to allow his creditor to take possession of his property, or his promise to pay, without a reasonable expectation of being able to do so, or statements of his expectations of realizing money, do not tend to show that the debtor is about to dispose of his property subject to execution, with the fraudulent intent to cheat, hinder, or delay his creditors.

SAME.—*Motion for New Trial.—Practice.*—If a motion in an attachment proceeding is for a new trial, “as well of the issue formed upon the attachment proceeding as of those formed upon the note and account, and all of them,” it may be regarded as a several motion upon the issues on the complaint and affidavit, and may be sustained as to the issues upon the affidavit and overruled as to the complaint.

APPEAL from the Elkhart Common Pleas.

OSBORN, C. J.—The appellees instituted an action against the appellant, and procured an order of attachment, by virtue of which personal property of the appellant was seized. He moved to dismiss the attachment proceeding. The motion was overruled. Issues of fact were formed in the action, and on the affidavit for the order of attachment. There was a trial by jury, resulting in a verdict for the appellees on both issues; a motion for a new trial was filed by the appellant and overruled, and final judgment rendered for the amount found, and for a sale of the attached property to make the judgment. Proper exceptions were taken to the rulings of the court.

Several reasons are assigned for a new trial in the motion. We shall notice but two of them; that the verdict was not sustained by the evidence, and that the court refused to give to the jury relevant and proper instructions.

The errors assigned are, overruling the motion to dismiss the attachment proceedings, and overruling the motion for a new trial.

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The ground of the motion to dismiss the attachment was the insufficiency of the affidavit, in stating the cause for the attachment. The language of the affidavit is as follows: "That the said Albert D. Parsons is about to sell, convey, or otherwise dispose of his property subject to execution, with the fraudulent intent to cheat, hinder or delay, his creditors." 2 G. & H. 138, sec. 156, item 6. The objection to it is that it is in the alternative.

The objection is not well taken. Where the disjunctive *or* is used, not to connect two distinct facts of different natures, but to characterize and include two or more phases of the same fact, attended with the same results, the construction contended for is not applicable. Drake Attachments, sec. 102.

The material point in the affidavit required by the statute is, that the party is about to dispose of property subject to execution, with the fraudulent intent to cheat, hinder, or delay his creditors. The manner of doing it is not material. *Van Alstyne v. Erwine*, 1 Kern. 331; *The Commercial Bank of Manchester v. Ullman*, 10 Sm. & M. 411; *Bosbyshell v. Emanuel*, 12 Sm. & M. 63; *Hopkins v. Nichols*, 22 Tex. 206.

The parties were dealers in lumber, the appellees in Michigan and the appellant in Goshen, in this State. He had purchased lumber of them on credit, and was unable to meet his payments as they became due. Unsuccessful efforts had been made to induce him to sell to them lumber at wholesale prices to pay their claim. They claimed that he agreed, at the time of making the arrangements for purchasing on credit, that he would at any time turn over the lumber to them, or enough of it to satisfy their demands against him. He denied it. He had promised to pay them from time to time, and failed from inability. He had also represented to them that he expected to receive money, when, as they attempted to show, he had no reasonable expectations of getting it. He caused an invoice of the lumber to be taken, a short time before the order of attachment was issued. There was evidence, tending to show that he was negotiating for a loan of money,

for the purpose of paying off the claim of the appellees, and that he intended to mortgage the lumber, to secure the payment of the money. He had also, at the request of the appellees, purchased horses and turned them over to them on account. One of them had been purchased to be paid for in lumber, which was being delivered in payment for the horse when the order of attachment was issued.

The appellant asked many instructions, all of which were refused. We do not deem it necessary to enumerate all of them. The second and third were as follows: 2. "The fact that the defendant at the time he made the purchase from the plaintiffs promised that at any time that the plaintiffs might feel insecure, they should have the right to take possession of the defendant's property, if you find such promise to have existed, and that the defendant refused to perform such promise, would not tend to prove that the defendant was about to sell, convey, or otherwise dispose of his property, subject to execution, with intent to cheat, hinder, or delay his creditors.

"3. The fact that a debtor, pressed by his creditor for payment of his debt, promised to pay him, when he had no reasonable expectations of being able to do so, or states to him that he expects to realize money from sources not within his reasonable expectations, does not tend to prove that the debtor was then about to sell, convey, or otherwise dispose of his property, subject to execution, with fraudulent intent to cheat, hinder, or delay his creditors."

The issue on the affidavit was whether the appellant was about to dispose of his property, subject to execution, with the fraudulent intent to cheat, hinder, or delay his creditors. His promises to allow the appellees to take possession of his property, or his promises to pay without reasonable expectations of being able to do so, or statements of his expectations of realizing money, could not tend to establish the issue. The one would simply show that he had broken his promise; the other, that he had not told the truth. The instructions should have been given.

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There was not sufficient evidence before the jury to sustain the verdict on the affidavit. There was no evidence of any attempt to sell his property or any of it, except in the ordinary course of trade; none showing any purpose, design, expectation, or offer to sell. The appellees attempted by persuasions and threats to induce him to give to them a preference over other creditors; and because he would not, they attached his property. The member of the firm who attempted to secure their pay and made the affidavit testified: "I got out the writ of attachment, because Parsons would not turn out lumber at wholesale prices. I relied upon the fact that he was losing money as an element of fraud." One of the agents of the appellees who endeavored to induce the appellant to pay or secure the debt, and who assisted in getting out the attachment, testified that the attachment was issued because the appellant would neither pay nor secure the debt.

The appellant was not bound to sell to the appellees, in order to pay or secure their claim against him. He was under no legal obligation to give them a preference over other creditors. Although there was no evidence that he was insolvent, nevertheless, such an act would have been an act of bankruptcy, under the bankrupt law.

The verdict in favor of the appellees on the complaint is sustained by the evidence. The verdict on the affidavit is not. The appellees insist that under the motion no new trial can be granted on the latter issue alone. We think otherwise. The motion was for a new trial "as well of the issue formed upon the attachment proceedings as of those formed upon the note and account, and all of them." We think it may be regarded as a several motion upon the issues on the complaint and affidavit.

There are many other questions discussed with much ability by counsel, but we do not deem it necessary to decide them in this case.

The judgment of the said court of common pleas, in favor of the appellees, for the amount specified in the verdict of

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the jury, is affirmed. The judgment ordering a sale of the attached property is reversed, with costs. Cause remanded, with instructions to the court below to grant a new trial on the issue on the affidavit for the order of attachment, and for further proceedings in accordance with this opinion.

A. S. Blake and *R. M. Johnson*, for appellant.

W. A. Woods and *G. D. Copeland*, for appellees.

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CITY.—*Aid to Railroad Company.—Petition.—Remonstrance.*—Where a petition asking a city to make a donation in aid of the construction of a railroad has been presented to the common council and referred to a committee of the council, persons who signed the petition may, by a remonstrance, withdraw their names from the petition while the same is in the hands of the committee; and if, after such withdrawal, there is not a sufficient number of petitioners asking the donation, the council cannot make the same.

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| 42 | 125 |
| 138 | 673 |
| 42 | 125 |
| 162 | 173 |

APPEAL from the Knox Common Pleas.

DOWNEY, J.—This was an action to enjoin the city from making a donation to the amount of one hundred thousand dollars in aid of The Vincennes and Cairo Railroad Company. The complaint shows that the plaintiffs are resident tax-payers of the city and liable to be taxed to pay the amount of said donation, if made, and for all city purposes. It is then alleged that on the 11th day of December, 1871, there was presented to the common council of said city a petition, by which the council was requested to make the donation in the sum aforesaid, payable as follows: fifty thousand dollars when the said railroad should be completed so as to connect with the Cairo & Vincennes railroad of the State of Illinois, and the two companies shall have completed their roads and have the same running regularly and for the carrying of passengers and freight from Vincennes, Indiana,

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to Cairo, Illinois; and the remaining fifty thousand dollars to be paid when the said railroad company shall have located and built the principal machine shops of their road at Vincennes, Indiana; and if the same was not done in two years, the donation was to be void. The road was to be built from Vincennes, through Knox County, to a point opposite, or nearly opposite, St. Francisville, and a bridge across the Wabash at that point. It is alleged that the petition purported to have been signed by four hundred and ninety resident freeholders of the city; that the common council referred said petition to a committee of its own members, which, on the 8th day of January, 1872, reported to said council that a majority of the resident freeholders of the city had signed the petition; whereupon the council accepted the report and directed the city attorney to prepare an ordinance for the purpose of making the donation of said amount, and determined to meet on the evening of the ninth day of January, 1872, for the purpose of passing said ordinance; that the council at that time failed to pass the ordinance only for the reason that a temporary restraining order had been granted herein. It is further stated that after the petition had been referred to said committee, and before any other steps had been taken in the matter by the common council, a remonstrance was presented to the council by two hundred and fifty-four citizens of said city, one hundred and sixty-five of whom appear also as signers of said petition; in which remonstrance the signers state that a petition had been circulated purporting to be in the interest of The Vincennes and Cairo Railroad Company, of Indiana, asking a donation of one hundred thousand dollars in aid of said road; that many of them signed their names on a blank page of the book upon the representation that the petition was for the purpose of obtaining the principal machine shops of said road and payable in twenty years in the bonds of the city. They further state that they find upon examination that the terms and conditions of said petition are widely different and not as they understood them; that they

would contribute liberally to obtain machine and manufacturing shops, working from one hundred to five hundred men, within their city, but do not want to have donated fifty thousand dollars more toward the building of so short a line of road without securing capacious shops and a large force of mechanics and labourers. They wanted to know with reasonable certainty in what way their city was to be compensated for its donation. They say that section 60 of the city charter provides, that it shall be the duty of the city council to control and do whatever may be necessary to carry into effect the substantial meaning of the petition; and they severally protest against the use of their names to said petition, and did thereby withdraw the same and remonstrate against said donations, being made, etc. It is further alleged that said one hundred and sixty-five citizens so remonstrating against making the said donation, and who severally appear as petitioners, protested against the use of their names to said petition, and thereby withdrew the same, for the reasons set forth in the remonstrance; that by the withdrawing of these one hundred and sixty-five citizens from the petition, as petitioners, there would remain only three hundred and twenty-five petitioners; and the resident freeholders of said city number at least eight hundred and fifty; that the petitioners to said petition, after those who so remonstrated have been deducted, do not constitute a majority of the resident freeholders of said city; but that the council refused to consider the remonstrance and withdrawal of said one hundred and sixty-five petitioners, and thereby only arrived at the conclusion that a majority of the resident freeholders of said city were petitioning for the making of the donation, when, in truth and in fact, the number of petitioners was and is much less than one-half the resident freeholders of said city. It is then alleged that the company has not been induced by the petition, or the proceedings of the council, to take any steps in the construction of its road; that although a majority of resident freeholders of said city do not remain petitioners, if not restrained, said city will, by

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the council, make the donation aforesaid before the final hearing of this cause.

Prayer for injunction temporary and perpetual. The complaint was verified by the affidavit of one of the plaintiffs.

A demurrer to the complaint was filed by the defendant, for the reason that the court had no jurisdiction of the subject of the action, and because the said complaint does not state facts sufficient to constitute a cause of action. The demurrer was sustained by the court, and final judgment rendered for the defendant.

The sustaining of this demurrer is the error assigned.

The position assumed by counsel for the appellants is, that the withdrawal of the one hundred and sixty-five names from the petition left less than a majority of the resident freeholders petitioning, and that for this reason the injunction ought to have been granted. The position of counsel for the appellee is, that the court had no jurisdiction of the action; that the action of the council in deciding upon the question whether a majority of the tax-payers were petitioning or not is conclusive, and that the court can not inquire into the question. It is insisted that the question as to the number of signers to the petition is jurisdictional, and when decided by the council, that its decision is final. On this point we are referred to *The Evansville, etc., Railroad Company v. The City of Evansville*, 15 Ind. 395, as an authority in support of the views of the appellee. There is a difference, however, between that case and this. There the subscription had been fully made, and the action was on the subscription to enforce its payment. Here the subscription was not fully made, and the object of the action was to prevent the making of it. Not regarding that case as decisive of this, we proceed to consider the question as to the effect of the action of the petitioners in signing the remonstrance and withdrawing their names from the petition.

The statute provides, "that any city, incorporated under the general law of this State, upon petition of a majority of the resident freeholders of such city, may hereafter subscribe to

the stock of any railroad, hydraulic company, or water power, running into or through such city, or near the corporate limits of said city, or to make, on petition of the majority of the resident freeholders of such city, donations in money or the bonds of such city, to aid in the construction of any such railroad, hydraulic companies, or water power; subject, however, to the limitations, direction, and restriction named in the provisos to the sixtieth section of the act entitled, 'an act,' " etc., "approved March 14th, 1867." 3 Ind. Stat. 114, sec. 1. The sixtieth section referred to, which has but a single proviso, reads as follows: "Any incorporated city, under this act, shall have power to borrow money to subscribe to the stock of any plank road, macadamized road, or railroad [running] into or through such city, to make donations in money, or the bonds of such city, to aid in the construction of such roads, only on petition of a majority of the resident freeholders thereof: Provided, That said donations shall not be payable, either in money or bonds, until the road in aid of which it is given shall be so far completed as to admit the running of trains from the point of commencement to such point or points as are designated in the petition, in the case of railroad, or passage of wagons, in the case of other roads, and when so far completed, it shall be obligatory on the common council of said city to contract and do whatever may be necessary to carry into effect the substantial meaning of such petitions, and the obligations herein enjoined may be enforced in the courts of this State having competent jurisdiction, on the application of any signer of such petition, or president of the road in behalf of which such donation may have been made, at any time after said petition or petitions have been presented to such common council, and for any debt in pursuance of the provisions of this section; in carrying out the intentions of the petitioners aforesaid, the common council shall add to the tax duplicate of such years thereafter, a levy sufficient to pay the annual interest on such debt or loan, with an addition of not less

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than five cents on the one hundred dollars, to create a sinking fund for the liquidation of the principal thereof, which fund, with all the increase thereof, shall be applied to the payment of such debt, and to no other purpose." *Id.* 93, sec. 60.

A petition is an instrument of writing, or printing, containing a prayer from the person presenting it, called the petitioner, to the body or person to whom it is presented, for the redress of some wrong, or the grant of some favor, which the latter has the right to give. *Bouv. Dic., tit. Petition.*

A remonstrance is defined to be a petition to a court or deliberative body, in which those who have signed it request that something which it is in contemplation to perform shall not be done. *Id., tit. Remonstrance.*

When a party who has signed a petition for the doing or granting of something afterward signs a remonstrance against the doing or granting of what he has petitioned for, it would seem reasonable that the one should counteract and destroy the effect of the other, if the remonstrance is presented before action has been had in accordance with the petition.

There would seem to be nothing irrevocable in the signing of a petition. We conclude that when the one hundred and sixty-five of the petitioners signed and presented to the council the remonstrance protesting against that for which they had petitioned, and withdrawing their names from the petition, it stood, so far as they were concerned, as though they had never signed it. As to the remonstrants who had not signed the petition, it seems to us that the remonstrance amounted to nothing. The law does not provide for remonstrating as a mode of opposing the granting of the petition. The petition must be signed by a majority of the resident freeholders, and until this has been done, the council should not act. When this condition has been fulfilled, it is immaterial as to remonstrances. But, as we have already held, we think a petitioner by remonstrating neutralizes the effect of his petition.

Was the remonstrance in time to counteract the effect of the petition? We think it was. The petition had been presented to the council, and it had been referred to a committee of the council when the remonstrance was filed. No other steps had been taken by the council, according to the complaint, until the one hundred and sixty-five petitioners had withdrawn their names from the petition. In our opinion, there had not been, at that time, any binding and conclusive action of the council upon the petition. No right to the amount intended to be donated had accrued in favor of any one, or which could be enforced by any one.

It is expressly alleged in the complaint that the petitioners who remained after the withdrawal of the one hundred and sixty-five names from the petition did not constitute a majority of the resident freeholders of the city. Without that number, the common council had no right to make the proposed donation. *The Evansville, etc., Railroad Co. v. The City of Evansville, supra.*

The position contended for by counsel for the appellee, that so soon as the petition has been presented, signed by a majority of the resident freeholders, the donation becomes at once valid and binding, can not be adopted as a just construction of the statutes in question. Some action on the part of the council seems to be necessary, and it may be essential to the rights of the petitioners that the council shall see that a compliance with the proper terms and conditions shall be secured. At all events, the council must ascertain that the petition has been signed by the requisite number of freeholders. This was not done when the remonstrance was presented. Thereafter there was not the requisite number of petitioners asking the donation.

A question suggests itself as to the power of the city council to donate fifty of the one hundred thousand dollars, on condition of the location of machine shops at Vincennes. Is it clear that the statutes in question authorize this, even upon the petition of a majority of the freeholders?

We do not decide anything as to the alleged misrepresen-

Perrin et al. v. Royal et al.

tation, upon which the signatures of the recanting petitioners were obtained.

The judgment is reversed, with costs, and the cause remanded, with instructions to overrule the demurrer to the complaint, and for further proceedings.

W. F. Pidgeon, for appellants.

T. R. Cobb and *J. M. Boyle*, for appellee.

PERRIN ET AL. *v.* ROYAL ET AL.

PROMISSORY NOTE.—*Renewal.*—*Instructions.*—*Error.*—Where a promissory note sued on was given in renewal of six other notes executed by the defendant, it was error to charge the jury, that if they believed that after the execution of the note in suit the plaintiff retained the six notes originally made by the defendant, as subsisting liabilities, and failed or neglected to deliver them up, the finding must be for the defendant.

APPEAL from the Tippecanoe Common Pleas.

WORDEN, J.—This was an action by the appellants against the appellees upon a promissory note executed by the defendants to the plaintiffs, for something over fifteen thousand dollars, payable at the Franklin Bank of Lafayette, Indiana. Issue, trial, verdict, and judgment for the defendants.

The note sued on, it was assumed, was given in renewal of six other notes, which had been previously executed by the defendants to the plaintiffs. The court charged the jury, among other things, as follows :

“Fourthly. If the jury believe from the evidence that the note in suit was given in consideration of six other notes which the plaintiffs held against the defendants, and that after the execution of the note in suit the plaintiffs retained the said six notes as subsisting liabilities, and failed and

neglected to deliver them up to the defendants or either of them, then the jury must find for the defendants."

Exception was duly taken to the instruction, and the question presented by it is properly reserved.

We are of the opinion that the instruction was erroneous.

We need not determine whether the giving of the note sued on was a satisfaction of the former ones, or whether that was a question to be determined from the evidence showing the intention of the parties in that respect. Nor need we determine what, if any, presumption of law would arise in such a case. The old notes, or the debts evidenced thereby, furnished an ample consideration for the execution of the new, whether the old ones were surrendered at the time, or not.

Now, the new note operated as a satisfaction of the old ones, or it did not. If it did not, the plaintiffs had a right to retain them as subsisting liabilities, and to sue upon them in case the new note should not be paid at maturity. If, on the other hand, the new note operated as a satisfaction of the old, the fact that the plaintiffs retained them as subsisting liabilities could not prevent them from recovering on the new. The mere retention by the plaintiffs of the old notes was a matter of no importance as affecting their right to recover on the new. If the old notes were satisfied by the new one, any claim upon them by the plaintiffs as subsisting liabilities would, of course, be unfounded; but it is not perceived how such mistaken claim on their part could prevent their recovery upon a legal and valid demand. It seems to us, therefore, that in any aspect of the case, the instruction was erroneous. There are some other questions discussed in the case, but as they may not again arise, we pass them. For the reason above stated, the judgment below will have to be reversed.

The judgment below is reversed, with costs.

R. C. Gregory and *R. P. Davidson*, for appellants.

J. R. Coffroth, *T. B. Ward*, *W. C. Wilson*, and *J. H. Adams*, for appellees.

GULICK v. CONNELLY.

CITY.—*Contract for Street Improvement.—Extension of Time.—Penalty.—*

Where a contract for a street improvement provided, that if the work should not be done within a time specified, and the contractor should desire an extension of time, such extension should only be granted on condition that five *per centum* per month should be deducted from the assessments for all work done after such extension, the deduction to operate for the benefit of the property holders;

Held, that the deduction provided for was in the nature of a penalty, which the common council might enforce or not, in its discretion.

Held, also, that the penalty was only to attach on condition that the contractor desired an extension of time.

PLEADING.—*Answer to Part of Cause of Action.*—An answer which assumes to be in bar of the whole action, when it is only in bar of a part, is bad.

JUDGE.—*Power to Correct Special Finding.*—A judge may correct his special finding during the term at which it is made, by finding upon issues that have been omitted.

SAME.—*Must Make Finding.*—In making a special finding, where there is any evidence on a point pertinent to an issue in the cause, the court is required to find, either that the fact did exist or that it did not exist.

SAME.—If the testimony is evenly balanced, the court should find against the party upon whom the burden of the issue rests.

CITY.—*Appeal from Precept.—Issues to be Tried.*—On an appeal from a precept issued for the collection of an assessment for a street improvement, the issues to be tried are, whether the proceedings of the officers subsequent to the order directing the work to be done were regular; whether a contract was made; whether the work was done, in whole or in part, according to the contract; and whether the estimate has been properly made thereon.

SAME.—*Improvement of Street.—Acceptance of Work.*—The acceptance by the city authorities of work done under a contract for a street improvement is only *prima facie* evidence that the work has been done in substantial compliance with the terms of the contract.

PRACTICE.—*Motion for Venire de Novo.—Special Finding.*—Where a court makes a special finding of facts and conclusions of law, but fails to find all the facts covering the issues and embraced therein, a motion for a *venire de novo* assigning such cause should be sustained.

APPEAL from the Tiptecanoe Common Pleas.

BUSKIRK, J.—This was an appeal from a precept issued in favor of the appellant, under an order of the common council of the city of Lafayette, to enforce the payment of certain assessments in favor of appellant, as contractor, for the improvement of Kossuth street in said city.

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181 111

42 134
139 353
139 864

42 134
149 192

The complaint was full and complete, and no objection was urged thereto in the court below. The appellee answered in three paragraphs. A demurrer was overruled to the third paragraph, and this ruling is assigned for error and presents the first question for our decision.

The substance of such paragraph is, "that said contract required the work to be completed on the first day of September, 1869, but that said work was not completed until, to wit, the 17th day of December, 1869, which was more than two months after the time required by said contract for the completion of said work; and defendant avers that by the terms of said contract, five per cent. per month should be deducted from said estimate and assessment against the property of said defendant, on account of said delay in the completion of said work, which deduction has not been made in said estimate and assessment; and the defendant avers that by reason of such delay, he has been greatly damaged thereby, in this, to wit, fifty dollars; and the said defendant says that said plaintiff ought not to have judgment for said assessment."

That portion of the contract referred to in the above paragraph of the answer is as follows:

"And it is further understood and agreed that if said party of the first part fails to complete said work within the time specified, and desires an extension of time to complete the same, such extension of time shall be granted only on condition that five per centum per month be deducted from the assessments of all work done after such extension, such deduction to operate for the benefit of the respective property holders in proportion to their assessments; and all damages arising on account of any failure on the part of the party of the first part to comply with the conditions of this contract shall be collected from the party of the first part, without any relief from valuation or appraisement laws."

The contract, of which the clause above quoted is a part, was entered into between the appellant and the common council of the city of Lafayette. The appellee was not a

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party to the contract. It is manifest that this clause must have been inserted at the instance of the common council, and that its purpose was to secure prompt performance on the part of the appellant. The provision that five per centum per month should be deducted from the assessment of all work done after the extension of the time of the completion of the contract, was in the nature of a penalty, which it was competent for the common council to enforce or not, in their discretion. And if they had chosen to enforce it, the time for them to have done so was when they allowed the last assessment; but it is shown not only by the answer, but by the transcript, that it was not enforced. The work was received by the city engineer, committee on street improvements, and common council, and the final estimate made. It should be observed that the penalty was only to attach on the condition that the contractor desired an extension of time for the completion of the work, when the extension could only be granted on the express condition that five per centum per month should be deducted from the assessment of all work done after such extension. If there was no extension of time asked by the contractor and granted by the common council, then the penalty did not attach, and the parties stood upon their common law liability, as though there was no such provision in the contract. It is not alleged in the answer that an extension of time was asked for and granted, nor is it shown what assessments were made for work done after such extension. Besides, the answer assumes to be in bar of the entire action, when the conclusion shows that it was only in bar of fifty dollars.

The court erred in overruling the demurrer to the third paragraph of the answer.

By the agreement of the parties, the cause was submitted to the court for trial; and the evidence being heard, the appellant asked the court to state the facts found in writing and the conclusions of law thereon by the court.

The facts so found and the conclusions of law thereon are as follows:

“The city of Lafayette contracted with the plaintiff in accordance with the statute, by which plaintiff agreed to make a partial improvement of Kossuth street in said city (a small part of the street adjoining lands not within the corporation when the contract was made). The question to be decided now is, was the work done according to contract? The grading and gravelling of the street were done according to specifications, and under the direction of the city engineer, except that for a distance of about half the line of the street; the grading was fifty-eight feet wide, instead of sixty feet; the grading was done, however, to the line of improvement as made, on each side of the street, under the direction of the city engineer, and but fifty-eight feet were paid for. This I find to be a substantial compliance. The grading is shown to have been well done. By the terms of the contract, the sidewalks were to be made four feet in width, of good, sound, common white pine plank, two inches in thickness, six inches in width, and twelve or sixteen feet in length, laid so as to break joints, on good, sound, white oak scantling, four inches square and four feet long, laid four feet apart transversely to the sidewalks, and to be securely spiked to the same by two four inch spikes in each scantling; the lumber to be free from sap and injurious defects.

“The improvement was finished, approved by the engineer, and accepted by the council, but the work was not done according to contract, in this: The timber of the sidewalks was not free from sap, and some (the number is not definite) of the cross pieces, to which the plank were nailed, were worm-eaten, having been sawed from dead timber. A part of the lumber which was brought to said improvement was rejected by the engineer, and was not used in the improvement; and the engineer testifies that he knew of no objectionable material being used, but the fact that some, in fact, a considerable amount (but not a definite amount) of lumber with sap from one to two inches wide was used, is established. The contract is positive that the lumber ‘must be free from sap.’ Had but a few pieces, but slightly injured

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by sap, been put in the work, I would have regarded the work as substantially done according to the contract, but a violation of so plain a provision of the contract does not, to my mind, justify a recovery. The acceptance by the city of the work is *prima facie* evidence that the work was done according to contract, but not conclusive. The statute itself shows this. This presumption in the case at bar has been rebutted; the precept should not have been issued; therefore, I find for the defendant."

The appellant excepted to the conclusions of law drawn by the court upon the facts found.

The appellant moved the court for a new trial, upon written reasons filed, which motion was overruled, and the appellant excepted.

Thereupon the appellant moved the court for a *venire de novo*, upon the ground that the findings of the court were imperfect and did not cover all the issues in the cause.

While such motion was pending, the following amendment to the special findings was made by the court:

"I find that the work has been done substantially according to contract, except as shown in the finding heretofore filed; that had the work been done as to the sidewalks according to the contract, the assessment would have been proper, and the precept properly issued. As the amount of lineal feet owned by the defendant and its proportion to the whole line of the street is correctly stated in the complaint, I find that the defendant's property is in the city, and he is not entitled to damages as set up in his counter-claim.

"JOHN M. LARUE."

To the making of which additional finding the appellant, at the time, objected and excepted.

After the filing of such amendment, the court overruled the motion for a *venire de novo*, to which appellant excepted.

The appellant then moved the court for judgment in his favor upon the special findings, which motion was overruled, and appellant again excepted.

The court thereupon rendered final judgment for the appellee.

The next assignment of error calls in question the correctness of the ruling of the court in overruling the motion for a *venire de novo*.

It is very earnestly insisted by counsel for appellant, that in deciding upon this question, we can only look to the original special findings of the court, for the reason that the court, having made and filed his findings, possessed no power to make any addition thereto. We think the objection is untenable. We are unable to see any valid objection to the action of the court. The special finding of the court stands upon different grounds than the verdict of a jury, but even a jury, before its discharge, may be required to correct and perfect the verdict or answers to interrogations. The same judge, ordinarily, presides during the entire term, and if he should, in the hurry of business, omit to find upon one of the issues, no injury can result in permitting him, during the term, to correct his finding.

But, conceding the right of the court to render the additional finding, it is maintained by counsel for appellant that he was, for two reasons, entitled to a *venire de novo*:

1. That the findings rendered are too vague, uncertain, and indefinite.

2. That the findings do not cover all the issues in the cause.

The court finds that the work was substantially done according to the contract, except the sidewalk. In our opinion, the defects in the sidewalks are not sufficiently pointed out to enable us to determine whether such work was done in substantial compliance with the contract.

It is found that some of the timber for the sidewalk was not free from sap. Again, it is found that a considerable amount of lumber that was not free from sap was used in the construction of the sidewalk, and some of the cross-ties were worm-eaten. The court was required to find the facts, and not to write the testimony of the witnesses. The thing to be found was, what was proved, and not conjectures or

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impressions. The court was required, where there was any evidence on the point, to find either that the fact did or did not exist. The court was bound to consider and weigh all the evidence on any given point, and then find one way or the other. If the testimony was evenly balanced, then the court should find the fact against the party upon whom the burden of that issue was. The law does not require a literal and exact performance of the work according to the contract, but it does require a substantial compliance with the contract. *The Board of Commissioners of Allen County v. Silvers*, 22 Ind. 491.

If the court had found the number of pieces of timber and lumber which were used that were not free from sap, and the number of cross-ties that were worm-eaten, we could determine whether there had been a substantial compliance with the contract. The finding is too uncertain and indefinite.

We proceed to inquire whether the findings cover and embrace all the issues in the cause.

What were the issues? They are plainly defined by the statute, as follows:

"And in case the court and jury shall find upon trial that the proceedings of said officers subsequent to said order directing the work to be done are regular, that a contract has been made, that the work has been done, in whole or in part, according to the contract, and that the estimate has been properly made thereon, then said court shall direct the property to be sold," etc. 3 Ind. Stat. 102.

The special findings wholly fail to show whether or not the proceedings of the city officers, subsequent to the adoption of the order directing the work to be done were regular, and whether or not the estimate had been properly made on the work.

It is also insisted by counsel for appellant that the court erred in finding as a conclusion of the law, that the acceptance of the work on behalf of the city authorities was only *prima facie* evidence that the work had been done in sub-

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stantial compliance with the contract. It is very earnestly insisted that such acceptance was conclusive evidence, in the absence of fraud or mistake, and in support of such position, we are referred to the cases of *The Board, etc., v. Silvers, supra*; *Wilson v. Poole*, 33 Ind. 443; *Wyckoff v. Meyers*, 44 N. Y. 143.

The authorities referred to do not support the position assumed. If the acceptance of the work by the authorities of the city is conclusive evidence that the work has been done according to contract, why is an appeal given to the property-holder from a precept? and why does the statute provide that one of the questions to be tried on such appeal is, whether the work has been done, in whole or in part, according to the contract? The property-holders have no opportunity to be heard before the common council, and it would be manifestly unjust to hold them concluded, without being heard.

We are of opinion the court erred in overruling the motion for a *venire de novo*.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below, to grant the *venire de novo*, and for further proceedings in accordance with this opinion.

J. R. Coffroth and T. B. Ward, for appellant.

W. C. Wilson, for appellee.

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| 154 | 85 |

HUSBAND AND WIFE.—Vendor's Lien.—Where a wife, her husband, and a third person were joint purchasers of certain real estate, and the deed of conveyance was made to them, and notes given for the purchase-money were not signed by the wife, but were signed by the husband and the other purchaser, and the husband and wife were purchasers of one-half of the premises, and the next day after the deed was made, the purchasers, with the con-

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sent of the vendor, had the name of the husband struck out of the deed by the justice of the peace who took the acknowledgment, and afterward the wife signed the notes;

Held, that the vendor would be entitled to hold a lien upon the real estate for the unpaid purchase-money, as against the wife.

Held, also, that the notes, as to the wife, were absolutely void, and she was not bound by stipulations therein to pay ten per cent. interest and to waive valuation and appraisement laws.

SAME.—Tenants by Entireties.—Where real estate is conveyed to a husband and wife and another person jointly, the husband and wife will take an undivided one-half of the premises, as tenants by entireties.

APPEAL from the Bartholomew Circuit Court.

BUSKIRK, J.—This was an action by the appellee against the appellant, Charles C. Anderson, and George W. Becker, upon two joint promissory notes and to enforce a vendor's lien.

The complaint consisted of four paragraphs. A demurrer was sustained to the first, second, and third paragraphs, and overruled to the fourth, to which rulings proper exceptions were taken. Issue was formed on the fourth paragraph of the complaint. The cause was, by the agreement of the parties, submitted to the court for trial. The court, at the request of the parties, rendered a special finding of facts and its conclusions of law thereon. The appellant alone excepted to the conclusions of law. Judgment was rendered for the appellee against Charles C. Anderson and George W. Becker, upon the notes, and that the appellee held a vendor's lien, to which judgment there was no exception. The court also rendered a decree that the appellee held, as against the appellant, a vendor's lien on the land described in the complaint, and decreed a sale of such land, without relief from the valuation and appraisement laws, to pay the amount found due with ten per cent. interest. The appellant excepted to so much of the decree as allowed interest at the rate of ten per cent. and provided for the sale of the land without relief from the valuation or appraisement laws.

All the questions arising in the record are presented by four assignments of error, and they are:

1. That the court erred in overruling the demurrer to the fourth paragraph of the complaint.

2. That the court erred in its conclusions of law upon the facts found.

3. That the court erred in rendering judgment against appellant for ten per cent. interest upon the purchase-money.

4. That the court erred in providing for the sale of the land of appellant without relief from valuation and appraisement laws.

We shall consider the first and second assignments of error together, as they present substantially the same questions.

The fourth paragraph of the complaint reads as follows :

"The plaintiff for further complaint herein says, that on the 25th day of May, 1867, he made and entered into a contract with Minerva B. Anderson, Charles C. Anderson, and George W. Becker, wherein he sold to them the following real estate, situate in Bartholomew county, in the State of Indiana, to wit: The undivided one-half of sixty-five (65) acres by parallel lines off of the east side of the east half of the south-east quarter of section 21, and sixty-five (65) acres off of the south end of the west half of the south-west quarter of section 22, and one hundred and twenty-eight (128) acres by parallel lines off of the west side of the south-east quarter of section 21; also, one hundred and twenty-seven (127) acres by parallel lines off of the west quarter of section 21; also, two (2) acres in the south-west corner of the north-west quarter of section 22; all in township 10, north of range five, east, containing in all three hundred and eighty-seven (387) acres, more or less, at and for the price of fifteen thousand dollars. Seven thousand five hundred dollars thereof to be paid in real estate, and the transfer of real estate; the residue thereof to be paid as follows: three thousand seven hundred and fifty dollars to be paid in twelve months, at ten per cent. interest after maturity; and three thousand seven hundred and fifty dollars payable twenty-four months from said date, with ten per cent. inter-

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est after maturity. Which said several sums said parties promised to pay; that a deed was made and executed by said plaintiff and wife under and pursuant to said contract to said defendants jointly for said lands, and the same was duly delivered to them; and said Becker and Anderson executed notes for said several sums of money, and the same were to be executed by said Minerva B. Anderson; and after the plaintiff had executed said deed and delivered the same to said defendants thereafter, to wit, on the — day of May, 1867, said defendants agreed among themselves that said deed should be changed, and desired that said deed should stand in the name of Minerva B. Anderson and said Becker jointly; and after the making of said notes by said Becker and Charles C. Anderson, with the understanding that the same should be executed by said Minerva B. Anderson, said defendants agreed to, among themselves, and did erase the name of Charles C. Anderson from said deed delivered to them, and said deed was recorded by them as altered by them (a copy of which is filed herewith); and thereafter, under and pursuant to said contract, said Minerva B. Anderson also signed said notes (a copy of which is filed herewith); that said notes are due and unpaid; that said Minerva B. Anderson, Charles C. Anderson, and George W. Becker immediately entered into the possession of all said land, and have held the same continuously since, and now hold the same; that all said defendants were the vendees of said land, and the plaintiff holds a vendor's lien on all said land to secure the payment of said purchase-money; that defendants have no personal property out of which to pay said indebtedness. Wherefore, plaintiff demands judgment for twelve thousand dollars, and that said indebtedness be declared the purchase-money for said land, and that said land be sold to pay said indebtedness, without relief from valuation laws, and all proper relief.

The special finding of facts was as follows:

It is found that on the 25th day of May, 1867, the plaintiff

and his wife sold and conveyed, by warranty deed, to Charles C. Anderson, Minerva B. Anderson, and George W. Becker, as joint vendees and purchasers, the following described real estate in Bartholomew county, etc. (describing it).

2. That the consideration to be paid for said conveyance was fifteen thousand dollars. Seven thousand five hundred dollars was paid at the time by the conveyance of other real estate to said Tannehill; and the said defendants, Charles C. Anderson and George W. Becker, at the same time executed and delivered to the said plaintiff their two promissory notes herein, due in twelve and twenty-four months from date, each for three thousand seven hundred and fifty dollars, drawing ten per cent. interest after maturity.

3. That long before the making of said conveyance to said defendants, at the time, and continuously since, the said Minerva B. Anderson was a married woman, the wife of the said Charles C. Anderson.

4. That at the time said conveyance was made, plaintiff and wife and the defendants were present, and the defendant Minerva B. Anderson knew that the conveyance was to herself, her husband, and Becker.

5. On the next day after the conveyance was made and delivered, Squire Roberts, the justice of the peace who had taken the acknowledgment, erased the name of Charles C. Anderson from the deed wherever it occurred. This was done because Becker so desired it, at the request of the Andersons, and was done in the presence of the Andersons. The plaintiff was not present when the erasure was made, but before it was made he had consented thereto. Plaintiff's wife never gave her consent to the change and had no knowledge of it.

6. That about one month after the attestation of the deed, Mrs. Anderson signed the notes; that the signing of the notes, by her was an afterthought, occasioned by the alterations in the deed; that there was no understanding as to her signing the notes when the deed was delivered.

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7. The erasure in the deed was not made for the purpose of defrauding any one, but made in good faith. Becker being the purchaser of one undivided half of the land, the parties were fearful if the deed remained as originally drawn, he could really hold but one-third.

8. It is further found that the sum of seven thousand five hundred dollars has been paid; that Becker has paid of this amount three thousand five hundred dollars, and Mrs. Anderson four thousand dollars—five hundred dollars of which was paid by said Charles C. Anderson, by conveyance of his own real estate at the time said deed was made by plaintiff, which was all the property owned by said Anderson at the time of sale of said land, and he was then, and he has been continually since, and is now, insolvent.

9. The amount found due the plaintiff for said land on purchase-money is nine thousand one hundred and twenty-five dollars; and it is further found that neither of the defendants has personal property, out of which any portion of this debt can be made, but that they have no personal property of any kind subject to execution.

10. The court does not find that said purchase from said plaintiff was for the benefit of said Minerva B. Anderson's separate estate, nor that she intended to or did charge her separate estate with said indebtedness; that she is now, and was at the time of said purchase, the owner of the other undivided one-half of all of said land as set forth in complaint, acquired part by descent from her father, and the rest by purchase from Richard Tannehill; and the court finds for said Minerva B. Anderson on all the paragraphs of the complaint, other than the fourth paragraph.

11. Charles C. Anderson and Mrs. Anderson's portion of the purchase-money, as between themselves and said Becker, is three thousand nine hundred and twenty-two dollars and fifty cents, the interest on her portion being calculated at ten per cent. after maturity of notes, to which said Minerva B. Anderson excepts; and the portion of George W. Becker of the purchase-money is five thousand two hundred and

two dollars and fifty cents, the interest being calculated at the rate of ten per cent.

From the facts as above found, the law is found in favor of the plaintiff as to the fourth paragraph of his complaint, and the conclusions of law are found as follows:

1. That as the conveyance originally stood, Charles C. Anderson was not a surety, but was a principal debtor; and being such, the plaintiff held a vendor's lien upon the real estate conveyed for the purchase-money.

2. That being a principal debtor in the beginning, his relation upon the notes was not changed to that of a surety. From what took place afterward, as shown by the facts as herein specially found, the vendor's lien still remains in favor of the plaintiff.

It is found by the court that Minerva B. Anderson, Charles C. Anderson, and George W. Becker were joint vendees and purchasers of the land sold by the appellee; that the deed was made by appellee and wife, in the presence of all of said vendees, to them jointly, and delivered to all of them. The notes for the unpaid purchase-money were executed by Charles C. Anderson and George W. Becker. Becker was the purchaser of one undivided half of said land, and became apprehensive that as the land was conveyed to all three, he could only hold one-third. In this he was mistaken. The land being conveyed to husband and wife, they took one undivided half of all the land conveyed, as tenants by entireties. *Chandler v. Cheney*, 37 Ind. 391.

But acting on such misapprehension, the vendees, the day after the execution of the deed and notes, with the consent of the vendor, had the justice of the peace who had taken the acknowledgment of the deed to erase and strike out of the deed the name of Charles C. Anderson. There was no understanding, at the time of the execution of the deed, that the appellant was to sign the notes, but in consequence of the alteration in the deed the appellant, about one month after such alteration, signed the notes.

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The question presented for our decision, upon the facts found by the court, is whether the appellee held a vendor's lien on the lands conveyed, as against the appellant.

It is maintained by counsel for appellant, that the appellee, by the change in the deed and notes, waived and abandoned the vendor's lien. The position of the counsel for appellant is stated in his brief as follows :

“When the change was made in the deed by the consent of Anderson and wife and Becker, Charles C. Anderson at once became and was a surety on the notes ; that it was so as between the makers of the notes, there can be no doubt or controversy. He became a surety by operation of law resulting from the change. Tannehill consented to the change, and continued to hold the notes as originally delivered to him, without requiring any change of the notes when he consented to the change, or afterward for a month, or stipulating that his lien should still be retained. When the change by his consent was made, Minerva B. Anderson and Becker became his trustees for his unpaid purchase-money, and Charles C. Anderson became a surety on the notes ; at least he was estopped from asserting to the contrary. He was presumed to know the legal effect of the change, and it was his right and duty, if he intended to retain his lien for his purchase-money, to have required a change of the notes, or an agreement that his lien should continue before consenting to the change. On the contrary, Tannehill held the notes in the condition they were when delivered to him, for about one month after his consent to, and alteration of, the deed making Mrs. Anderson and Becker his grantees ; and then, in consequence of the alteration of the deed, he procured Mrs. Anderson's signature to them ; at least he assented to it, the notes being in his possession and under his control. It is true that the note as to Mrs. Anderson as a promise to pay is void ; yet, as to Tannehill, it was binding as fixing the time of payment. The fact that he took her signature to the note, when and under the circumstances he did it, is valuable as a ‘circumstance,’ throwing light upon the whole

transaction, it having been done after Mrs. Anderson and Becker were by consent of parties made the grantees, and in consequence of that change in the deed, and a circumstance from which the court not only can, but is bound to infer that Tannehill did not rely upon his lien."

The position of the counsel for appellee, as stated in his brief, is as follows:

"When appellee delivered his deed to the joint vendees, he was divested of his title. He no longer possessed or held any interest in the land. The power of alienation or change of title was with the vendees only. It was unimportant to appellee, so far as he was concerned, after he was divested of title, who might subsequently become the owner, or how he might become such owner, only so far as it might affect his vendor's lien, and his lien could only be affected by the acquisition of the property by a *bona fide* purchaser who had no notice of the unpaid purchase-money, for all purchasers with notice, and all volunteers who hold without value, are affected by the vendor's lien.

"Anderson is still a joint owner. If he should assert his right, there is no equity to prevent it, as he paid part of the purchase-money by the transfer of part of his real estate, and an estoppel would only operate as against him, when to permit him to claim it would operate as a fraud or an injury to some third party induced to act on faith of the erasure. But whether Anderson was estopped or not, does not affect the vendor's lien, or his claim in this case. The fact that the appellee may be estopped to deny that the deed was executed to the two, if such may be the case, does not affect the lien. The fact that the vendor may make a deed to one person, does not estop him to assert that another was the original purchaser and vendee, and gave his note for the purchase-money, and that the deed was made at the direction of the original vendee to such third party, and that he was a volunteer, or that he took his deed with notice that the purchase-money was unpaid. Appellant argues that because C. C. Anderson's name, after the delivery of the deed, was erased,

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he became surety for the others. He was a principal debtor—one of the vendees. Even security given for purchase-money will not affect such lien, unless it is given in pursuance of the original agreement. Security voluntarily given by the vendee will not affect the lien. *Vandoren v. Todd*, 2 Green Ch. 397.

“But Anderson was not a surety. The court finds that it was a joint purchase, the three were joint purchasers and vendees, and the lien attached immediately on the sale, when the deed was made and delivered to them.

“Tannehill sold the property to these parties jointly. They were joint purchasers, and are jointly liable to him. The deed was delivered to them jointly, and the title vested in them jointly from delivery. From the consummation of the sale, the vendor's lien attached to the land, which could not be divested by any subsequent arrangement between the purchasers. The purchaser might have ordered the deed to be made to any other person, and the lien would have followed it. The fact that the purchasers agreed after the sale was completed to them, that two of them should have and hold the title, does not render one of the joint purchasers a surety for the others as to the vendor.

“Equity as between the purchasers might decide that, as between themselves, two should pay the debt and be primarily liable before the other who surrendered his interest in the land to them, but as between them and the vendor, they were all vendees, as the court decides and finds in this case; and the cases cited by appellant only go to the extent that a court will settle the equities between the parties, and if one ought primarily to pay before another, the court will so decide. That does not affect this question. His lien attached; they were all vendees. Appellee at no time accepted part as principals and one as surety. No such agreement existed, no such contract was made, and none can be inferred, because C. C. Anderson was worth nothing after his name was erased from the deed, as will be seen in the finding.”

We are quite clear, that upon the facts found by the court, the appellee had a lien upon the property in controversy for the unpaid purchase-money, as against Minerva B. Anderson. The fact that she was a married woman in no manner affected her right to purchase and hold real estate. This right she possessed at common law. The inhibition in our statute, in reference to married women, is not against the right to purchase and hold real estate, but it is against the alienation thereof without the consent of her husband. She had the right to purchase the property, and the law created the vendor's lien. There is nothing in the record which indicates any intention on the part of the appellee to waive or abandon such lien. Anderson executed the note as a principal, and there was no agreement, if such could be made, by which he was to become a surety. We think it very clear that he remained liable as a principal on the notes. The effect of striking out his name from the deed was to vest the entire title to one-half the land in his wife, the same as if he had conveyed it to a person with notice of the vendor's lien, which conveyance would not defeat the vendor's lien.

The note as to Mrs. Anderson was absolutely void. It created no personal liability against her, nor was she bound by the stipulation therein contained to pay ten per cent. interest or the agreement to waive the valuation and appraisement laws. The court, therefore, erred in computing the interest against her at the rate of ten per cent. Where there is no agreement in writing to pay a greater rate of interest than six per cent., no more than six per cent. can be recovered. The note being void as to Mrs. Anderson, there was no valid waiver of the valuation and appraisement laws. See *Ham v. Greve*, 41 Ind. 531.

The judgment of the court below is affirmed as to Anderson and Baker, and is reversed as to the appellant, with costs in favor of appellant and against appellee; and the cause is remanded, with directions to the court below to render a decree against the lands of the appellant for the amount that

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may be found due from her, computing the interest thereon at the rate of six per cent. and providing that such lands shall be sold with relief.

S. Stansifer, for appellant.

F. T. Hord, for appellee.

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CRIMINAL LAW.—Pleading.—Former Conviction.—In all criminal prosecutions, the defendant, under an oral plea of the general issue, may show a former conviction for the same offence.

APPEAL from the Huntington Common Pleas.

DOWNEY, J.—This was an information against the appellant for an assault and battery, committed on one Westhofer. The defendant, on arraignment, pleaded the general issue orally, and on the trial offered in evidence the judgment of a justice of the peace, with parol evidence of the identity of the defendant and of the crime, to show a former conviction for the same offence. This evidence was rejected by the court, on the objection of the State. We see no objection to the admissibility of this evidence, and the Attorney General states in a brief, filed in the case, that he has examined it and is satisfied that the court erred in refusing to allow the defendant to read the record in evidence. The defendant may prove a former conviction under the general issue, pleaded orally. 2 G. & H. 413, sec. 97. *Clem v. The State*, *post*, p. 420.

The judgment is reversed, and the cause remanded for a new trial.

B. M. Cobb and *B. F. Hendrix*, for appellant.

J. C. Denny, Attorney General, and *B. T. Ibach*, for the State.

SUMMERS ET AL. v. HOOVER ET AL.

EVIDENCE.—*Fraudulent Conveyance.*—Certain real estate was purchased of A. and conveyed to B., and by B. and his wife conveyed to C., the father of B.'s wife, and by C. conveyed to the wife of B. In a proceeding to subject said real estate to the payment of a judgment against B. on the ground of fraud; *Held*, that under an answer of general denial evidence was admissible that C. was to pay A. the consideration for the real estate; that the deed was to have been made in the name of B.'s wife; that it was made to her husband without her knowledge and consent, and that she objected to its being made to her husband as soon as she knew of the fact.

CONVEYANCE TO WIFE.—*Gift from Father.*—Where a father, to provide his daughter with a home, paid the purchase-money for certain real estate, intending to make a gift of it to his daughter, and the real estate was conveyed to the husband of the daughter, and she never relinquished to her husband her right to hold the purchase-money or the benefit of it to her separate use; and afterward the husband, in consideration that his wife's father had paid the purchase-money for her benefit conveyed the real estate through the father to her, she had the right to hold it against a creditor of the husband.

SAME.—Where a married man, about the time of making a purchase of real estate, informed his wife that if her father would pay the purchase-money he would have the conveyance made to her; and the father of the wife, in pursuance thereof, paid for the land; and without the consent of the wife, or of her father, the deed was taken in the name of the husband; and afterward, being in failing circumstances, he, in order to fulfil his promise to his wife, conveyed the real estate to her through a trustee;

Held, that the conveyance was founded on a good consideration, and was not fraudulent, and the land could not be taken from the wife to pay the debts of the husband.

APPEAL from the Henry Circuit Court.

DOWNEY, J.—This was an action by the appellees against the appellants. It is stated in the complaint that on the 19th day of April, 1871, the plaintiffs recovered a judgment against Horace Summers and Charles C. Shedron as partners, in the common pleas of Henry county, for six hundred and sixteen dollars and fifty-eight cents; that an execution was issued thereon and levied upon certain real estate described in the complaint; that the real estate was advertised and offered for sale, but no one bid on it; that the

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partnership between said Summers and Shedron was dissolved in 1871, and said Shedron sold his interest in the partnership stock to one Wischart, for one thousand and sixty-three dollars, and took Wischart's notes therefor, payable to David Van Mater, to hinder, delay, and defraud the creditors of Shedron, and without any consideration from Van Mater; and that at said time, with intent to delay and defraud his creditors, Shedron conveyed to Van Mater the said real estate so levied upon by the sheriff, with the consent and by collusion with Van Mater, and without any consideration; and that Van Mater, without any consideration, reconveyed said real estate to Maria Shedron, wife of said Charles C. Shedron, she having full knowledge of the facts.

Prayer that the plaintiffs have judgment for seven hundred dollars; that said conveyances be declared fraudulent; that said judgment be declared a lien upon said real estate; that a writ of attachment issue against said Summers and Shedron, and a writ of garnishment against said Wischart, etc.

Answer by general denial. Trial by jury and general verdict for plaintiffs, with answers to certain interrogatories propounded to the jury. There was a motion made by the defendants for a new trial, for the reasons, among others, that the evidence was not sufficient to support the verdict of the jury; that the court had improperly refused to admit certain specified evidence offered by the defendants, and had erred in certain of the charges given to the jury, and in refusing other charges designated by their numbers.

Among the errors assigned, it is alleged that the complaint does not state facts sufficient to constitute a cause of action, and that the court improperly refused to grant a new trial.

The specific objection urged against the complaint is, that it does not show that Shedron had not other property sufficient to pay the debt mentioned without resorting to the land in question. As the complaint, in this respect, can be amen-

ded on return of the cause to the circuit court, if it shall be deemed necessary, and as we have concluded to dispose of the case on other grounds, we will not stop to consider that question, but will proceed to examine the questions presented on the motion for a new trial.

There is very little conflict in the evidence. It appears that Shedron was indebted to Van Mater in the sum of one thousand dollars, which Shedron had agreed to secure by a mortgage on his interest in the partnership stock, but had not done so; that Van Mater had intended to give this amount to his daughters, six hundred dollars to Mrs. Shedron and four hundred to Mrs. Painter; that for this reason the note of Wisehart was made payable to him; that Van Mater paid for the land, which was purchased from one Hopper designing it for his daughter, Mrs. Shedron, but the deed was made in her husband's name; and that for this reason, Shedron conveyed to Van Mater, and Van Mater to Mrs. Shedron. The *bona fides* of these transactions was the question in controversy. While Mrs. Shedron was on the witness stand, at the proper time, her counsel propounded to her the following questions, which the court refused to allow her to answer:

“ 1. State what agreement, if any, was made between you and your husband before and at the time the property was purchased of Hopper, as to who should furnish the purchase-money and to whom the deed should be made.

“ 2. State when the deed from you and your husband to David Van Mater, and the deed from Van Mater to you, were first made out, and when they were finally executed.

“ 3. State whether or not the deed from Hopper to your husband was made to him with your knowledge and consent.

“ 4. State whether or not you consented to have the deed from Hopper made to your husband.

“ 5 State what agreement, if any, was made between you and your husband, at the time the property was finally paid for, as to the person to whom the property should be conveyed.

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"6. State whether or not, after you learned that the title was in your husband, you objected to it, and what agreement he made about reconveying it to you, if any."

The reason for refusing to allow her to answer the questions was, that the evidence sought to be elicited was not admissible under the issue formed by the general denial.

It is, perhaps, more common to state in the bill of exceptions the facts which the party offered to prove, than to set forth the questions propounded. But assuming that Mrs. Shedron would have answered that her father was to pay the consideration for the real estate; that the deed was to be made in her name; that it was made to her husband without her knowledge and consent; and that she objected to the deed being in the name of her husband so soon as she knew of the fact, etc., we think the offered evidence was clearly admissible under the general denial, as tending to negative the fraud charged in the complaint, and which, under the general denial, the plaintiff was bound to prove. 2 G. & H. 113, sec. 91.

The court was asked by the defendants, and refused, to give the following instructions:

"If you find that David Van Mater, for the purpose of providing his daughter, Mrs. Shedron, a home, paid the purchase-money for the house and lot in suit, intending to make a gift of it to his daughter, and Mrs. Shedron never relinquished to her husband her right to hold said purchase-money or the benefit of it to her separate use, and afterwards the husband, Charles Shedron, in consideration that said Van Mater had paid said purchase-money for the benefit of Mrs. Shedron, conveyed through David Van Mater said real estate to his wife, she would have the right to hold it, and your verdict upon that branch of the case should be for the defendants.

"If you find that Charles Shedron, about the time of making the purchase of the real estate in suit, told his wife that if her father would pay the purchase-money he would have the deed made to her, and in pursuance of

Ridgeway v. Dearinger.

this agreement the father of the wife did pay the purchase-money, and Shedron, without his wife's or her father's consent, took the deed in his own name, and afterward, being in failing circumstances, and in order to fulfil his promise to his wife and put the title in her, he conveyed said real estate to her, through a trustee, this conveyance would be founded upon a good consideration, and would not be fraudulent, and the land can not be taken away from the wife to pay the debts of the husband."

The ground covered by these charges was not covered by the charges given. We think they are correct, and that the court should have given them. Upon the facts assumed in the charges, no part of the husband's means was vested in the real estate in question, and the sale of it to pay his debts would be simply taking what was given to the wife by her father for her own use, and applying it to the discharge of her husband's indebtedness.

There were other reasons urged for a new trial, but we do not deem it necessary to consider them, as, for the reasons already stated, we think the new trial should have been granted.

The judgment is reversed, with costs, and the cause remanded, with instructions to grant a new trial.

M. E. Forkner and *E. H. Bundy*, for appellants.

J. Brown and *R. L. Polk*, for appellees.

RIDGEWAY v. DEARINGER.

PRACTICE.—*Special Finding.—General Verdict.*—It is only when a special finding of facts is inconsistent with the general verdict, that the former will control the latter.

SAME.—If a special finding can by any hypothesis be reconciled with the general verdict, the latter will control, and the court will not render judgment against the party who has the general verdict in his favor.

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| 42 | 157 |
| 143 | 387 |

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| 42 | 157 |
| 158 | 663 |

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| 42 | 157 |
| 164 | 407 |

Ridgeway v. Dearing.

ASSIGNMENT OF ERROR.—*Insufficient Complaint.*—Where the error assigned in the Supreme Court is, that a demurrer ought to have been sustained to the complaint, and no demurrer appears in the record, the sufficiency of the complaint is not presented by the assignment.

APPEAL from the Howard Circuit Court.

OSBORN, C. J.—This was an action to collect the amount of benefits assessed against the land of the appellant for the construction of a ditch by the appellee, under the act of March 11th, 1867. 3 Ind. Stat. 228.

The complaint sets out the proceedings before the county commissioners, the appointment and return for the assessment of the appraisers; that the appellant appealed from the assessment to the court of common pleas; that the appeal was tried and a verdict and judgment rendered in favor of the appellee, fixing the amount of assessment of benefits to the land of the appellant at the sum of one hundred and twenty-five dollars; and that the same should be a lien upon the land described in the complaint. It is also averred in the complaint that the ditch had been fully completed according to the specifications set forth in the application; that after its completion and more than ten days before the commencement of the action, he demanded of the appellant the payment of the assessment, which he refused to make; that the same remains due and unpaid. Judgment is demanded for one hundred and twenty-five dollars with interest thereon, and that the same be a lien upon the land, and that the court order and decree its sale on the judgment, and for proper relief.

A copy of the petition to the county commissioners, the order of the board appointing the appraisers, their oath, assessment and return, the record and judgment of the court in the appeal from the assessment, are all filed with and made a part of the complaint.

The appellant filed an answer of seven paragraphs.

After setting out the answer, the record recites that the court overruled a demurrer to four paragraphs of the answer; that a reply was filed; that the defendant filed a demurrer

Ridgeway v. Dearing.

to the second paragraph of the reply, and that it was sustained. The reply copied into the record contains but one paragraph, and that is a general denial.

There is no demurrer to the answer or reply in the record, nor does it state that any demurrer was filed to the answer.

The cause was tried by a jury, who returned a general verdict of sixty-seven dollars for the appellee, and answers to interrogatories submitted to them at the request of the appellant.

The appellee remitted all of the verdict but thirty dollars.

The appellant then asked for a judgment in his favor against the plaintiff on the special findings of the jury, which was overruled.

Judgment was rendered for the appellee for the sale of the land to make the sum of thirty dollars and costs.

Proper exceptions were taken to the several rulings and judgments of the court.

The errors assigned are :

1st. In not rendering judgment for the appellant on the special findings of the jury.

2d. In not sustaining the demurrer of the appellee to the appellant's answer to complaint.

According to the specifications in the application made by the appellee, "the total length of said proposed drain will be 162.08 rods, with an average fall per mile of five and one-half feet. Said drain will be six feet at the top and one foot at the depth of three feet."

The following question was submitted to the jury, at the request of the appellant:

"Did the plaintiff construct said ditch over the lands of the defendant six feet wide at the top, three feet deep, with an average fall of five and one-half feet per mile over the lands of the defendant?" To which the jury answered, "No."

That is the special finding which the appellant claims entitled him to a judgment over the general verdict for the appellee.

The ditch was one hundred and sixty-two rods and a frac-

Ridgeway v. Dearing.

tion in length. It ran across the lands of three persons, including forty acres belonging to the appellant. It was to be six feet wide, three deep, with an average fall of five feet and a half to the mile. The jury could not answer the interrogatory affirmatively, if the average fall of the whole ditch had been five feet and a half to the mile, nor if it had been six feet wide and three deep, unless it had the requisite average fall over the land of the appellant. The drain might have been of the width, depth, and average fall, according to the specifications, and still the jury could not answer the interrogatory affirmatively. The inquiry related to the ditch over the appellant's land, and not to its whole length, whilst the specifications related to the whole ditch.

The general verdict for the plaintiff was, in effect, that the work was done according to the specifications. The special finding is not inconsistent with it.

It is only when the special finding of facts is inconsistent with the general verdict, that the former will control the latter. Sec. 337, 2 G. & H. 206. *The Board of Comm'rs, etc., v. Kromer*, 8 Ind. 446. If the special findings can, upon any hypothesis, be reconciled with the general verdict, the latter will control, and the court will not render judgment against the party who has the general verdict in his favor. *Amidon v. Gaff*, 24 Ind. 128.

The court committed no error in refusing to render judgment for the appellant on the special finding. There being no demurrer in the record, the court committed no error in not sustaining one to the complaint. There are several causes for demurrer specified in the statute, and in the absence of the demurrer we do not know that any cause was stated.

The sufficiency of the complaint is not before us. The error assigned is not that the complaint was not sufficient, but that the demurrer ought to have been sustained.

The judgment of the said Howard Circuit Court is affirmed, with costs.

D. Moss, for appellant.

C. N. Pollard and *J. W. Cooper*, for appellee.

WERTZ v. THE STATE.

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| 42 | 161 |
| 130 | 68 |

CRIMINAL LAW.—Nuisance.—Evidence.—In a prosecution for the erection and maintenance of a nuisance, where it is alleged that the nuisance is located upon a particular tract of land, the State is bound to prove the location as alleged, or fail in the prosecution.

APPEAL from the Marion Criminal Circuit Court.

WORDEN, J.—This was a prosecution against the appellant for the erection and maintenance of a nuisance.

The case was commenced and tried before a justice of the peace, where the defendant was convicted and fined; but he appealed to the court from which this appeal is taken and upon trial therein was again convicted and fined, a motion for a new trial having been made in his behalf and overruled. Exception.

Two errors are assigned.

1st. That the court below erred in overruling a motion to quash the affidavit on which the prosecution was founded.

2d. That the court erred in overruling the motion for a new trial.

No objection is pointed out to the sufficiency of the affidavit, and we see none. We pass, therefore, to the consideration of the motion for a new trial.

The affidavit charges the nuisance (a soap factory) to have been erected and maintained in Center township, in said county of Marion, near to the city of Indianapolis, "upon the following land, to wit: The south-west quarter of section thirty-five (35), township seventeen (17), range three (3) east." It contains sufficient averments, as we think, to show that the establishment was a nuisance.

But on the trial of the cause, as is shown by a bill of exceptions, "there was no evidence to prove that said house so erected and used by the defendant, in the manner and for the purposes specified in said affidavit, was situated in or upon the land" specified in the affidavit, "as alleged in said

affidavit; nor that said furnace, boiler, or other apparatus, or other machinery, or any part thereof, was in or upon said" land, "nor that any portion of the operations for the manufacture of soap, or for any other purpose, as alleged in said affidavit, was performed in or upon said" land.

But it was shown that the nuisance was in Center township, in said county, and near to the city of Indianapolis; and in other respects the case was sufficiently made out.

The question arises whether the State, she having alleged that the nuisance was located upon a particular tract of land, was bound to prove it as alleged, or fail in the prosecution. We are of opinion that she was, and that the defendant's motion for a new trial should have prevailed. Perhaps the locality of a nuisance should be specifically described, where it is to be abated, so that the sheriff may execute the order of abatement with certainty and without mistake. *Wood v. The State*, 5 Ind. 433.

There was, however, no order of abatement in the present case, and it would seem that where no abatement is sought such locality need not be specifically stated, and perhaps not in any case. *Howard v. The State*, 6 Ind. 444.

But conceding that it was not necessary to have stated the particular tract of land on which the nuisance was located, but having stated it, the authorities are clear, as we think, that the State was bound to prove the location as stated. Gould Pl. 148, sec. 183, *et seq.*

We quote the following passage from Roscoe Crim. Ev. 85 :

"Where the name of a place is mentioned, not as matter of venue, but of local description, it should be proved as laid, although it need not have been stated. Thus where an indictment charged the defendant with being found armed, with intent to destroy game in a certain wood called the Old Walk, in the occupation of J. J., and it appeared in evidence that the wood had always been called the Long Walk, and never the Old Walk, the judges held the variance fatal."

The text is fully sustained by the case of *Rex v. Owen*, 1

Moody, 118. Here the particular tract of land on which the nuisance was alleged to have been situated was not stated as matter of venue, for the venue was Marion county. It was stated as descriptive of the offence charged in respect to its locality, and being thus matter of description, though perhaps unnecessarily stated, should have been proved as stated. We quote the following paragraph from 3 Stark. Ev. 1574:

“An action for a nuisance to the plaintiff’s real property, whether corporeal or incorporeal, is local, and the action must be brought in the county where the property is situate.

“But it is not necessary to describe the precise local situation either of the property injured, or of the gravamen.

“And unless a precise description be given, the place mentioned will be ascribed to venue, and not considered to be descriptive.

“But if in such case a precise local description be given, it must be proved as laid, and a variance will be fatal.”

It was upon this principle that the case of *Ball v. The State*, 26 Ind. 155, was decided. That was a prosecution for a misdemeanor in forcibly entering and detaining property described as follows: “The following described land, and the first story of the building situate thereon, viz., the north-east corner of lot number one hundred, as designated on the original plat of the town of Lafayette,” etc.

The proof showed the premises entered to be a building on the lot mentioned, but not on the north-east corner thereof, and the variance was held to have been fatal.

ELLIOTT, J., dissented from the conclusion arrived at by a majority of the court, but not upon the legal proposition above stated. He thought the building was shown to have been on the north-east corner of the lot, with a view to its situation as stated in his dissenting opinion.

The judgment below is reversed, and the cause remanded for a new trial.

J. R. Troxell and ——— Ryman, for appellant.

J. C. Denny, Attorney General, for the State.

Rickart *et al.* v. Davis *et al.*

RICKART ET AL. v. DAVIS ET AL.

PLEADING.—*Complaint for New Trial.*—In a complaint to obtain a new trial on the ground of newly-discovered evidence, it is not necessary to make a transcript of the record of the former trial a part of the complaint; but it is necessary to state the issues and evidence on the trial, and also the newly-discovered evidence.

NEW TRIAL.—*Newly-Discovered Evidence.*—*Diligence.*—To entitle a party to a new trial on the ground of newly-discovered evidence, he must show that he has used due diligence to obtain it; and it is not sufficient to say, that up to the time of the former trial, and for some days after, he was not able by proper diligence to discover it.

APPEAL from the Warren Common Pleas.

OSBORN, C. J.—This was a complaint to obtain a new trial for newly-discovered evidence. A demurrer was sustained to the complaint, to which the appellants excepted; and declining to amend, judgment was rendered against them for costs.

They appeal to this court and assign for error:

1. Sustaining the demurrer to the complaint.
2. Sustaining the appellees' motion for judgment for costs.
3. Rendering judgment in favor of appellees.

The complaint does not expressly state what were the issues in the cause which had been tried. The pleadings in that cause are not before us, nor are their contents stated. The complaint states, "that the allegation of the partnership of the defendants as set forth in the complaint of the plaintiff in said action was denied in each of the separate answers of the said defendants, filed by them in said action; that to maintain the issue of partnership between the said defendants as alleged on the part of the plaintiffs in their said complaint, they" introduced certain evidence, which is stated in the complaint, on the subject of the partnership. It also alleges that evidence was introduced by the defendants on the same subject. After setting out the evidence introduced by both parties, the complaint states, "that the above is all the evidence given and offered on said trial by said parties or either of them, going to the merits of the complaint and to the said issue of partnership."

We may well presume that there was some other issue between the parties than the partnership of the defendants. We cannot say that the verdict was rendered against the plaintiffs on the issues stated in the complaint for a new trial. We do not know what the issue was. We cannot tell by the allegation in the complaint before us what the action was for. It is argumentatively stated that one of the issues tried was the partnership of the defendants. It is also stated "that said trial resulted in a verdict for the defendant George W. Davis, and against the said defendant Austin High."

The application was made after the term at which the cause was tried. The issues and the evidence in the cause tried are not before the court, except as they are shown by allegations in the complaint. It is not necessary to make a transcript of the record of the former trial a part of the complaint. *McKee v. McDonald*, 17 Ind. 518. Still it is necessary to state the issues and evidence in the trial, and also the newly-discovered evidence, to enable the court to judge whether the newly-discovered evidence, considered in connection with that which was before introduced, would, under the issues, change the result. "There are other matters, also, that must appear, but the issues in the cause, the old and new evidence, surely should be three matters appearing." *Glidewell v. Daggy*, 21 Ind. 95.

The averment of diligence, and that the evidence was newly-discovered, was as follows: "That up to the time of said trial, and for some days after, they were not able, by proper diligence, to discover evidence of a direct statement having been made by the defendant George W. Davis, that he was a partner of the said Austin High." That was not sufficient. To entitle a party to a new trial on the ground of newly-discovered evidence, he must show that he had used due diligence to obtain it. *Ruger v. Bungan*, 10 Ind. 451; *Mason v. Palmerton*, 2 Ind. 117; *Coe v. Givan*, 1 Blackf. 367. In this case no diligence is shown.

The demurrer to the complaint was correctly sustained.

Wachstetter v. The State.

The judgment of said Warren Common Pleas Court is affirmed, with costs.

M. M. Ray, G. H. Voss, B. F. Davis, and J. A. Holman,
for appellants.

J. McCabe, for appellees.

WACHSTETTER v. THE STATE.

CRIMINAL LAW.—*Appeal from Justice of the Peace.*—*Criminal Circuit Court.*

An appeal will lie from a conviction for an assault and battery before a justice of the peace to a criminal circuit court, and such court has jurisdiction to try such cause on appeal.

SAME.—*Practice.*—On an appeal from a conviction for an assault and battery before a justice to a criminal circuit court, the case is properly tried upon the original affidavit, and no indictment is necessary.

PRACTICE.—*Estoppel.*—A party cannot appeal, and have all the benefit to be derived from the appeal, and then be heard to say that because of some informality in his proceedings to obtain an appeal, he did not in fact appeal.

APPEAL from the Marion Criminal Circuit Court.

WORDEN, J.—The appellant was prosecuted before a justice of the peace of Marion county for an assault and battery upon Thomas Johnson, where he was fined in the sum of five dollars and adjudged to pay the costs. He appealed to the Marion Criminal Circuit Court, and entered into a recognizance for his appearance in that court at what was then "the present term" of that court, to answer the charge. In the latter court, he appeared and went to trial of the charge on the original affidavit, which had been filed before the justice, was convicted, and fined in the sum of one hundred dollars, and adjudged to pay the fine and costs. He moved in arrest of judgment, but his motion was overruled, and he excepted.

Two principal points are made, on which it is sought to reverse the judgment, viz.: 1. That an appeal does not lie in such case from a justice to the criminal circuit court, and that the latter court has no jurisdiction to try such case on

appeal. 2. That if the appeal lies, and the court has jurisdiction, still an indictment was necessary to have been found, and that the case could not have been tried on the original affidavit.

Upon the passage of the code of 1852, appeals in such cases from justices of the peace could be taken only to the court of common pleas. 2 G. & H. 638, sec. 10.

But, on December 20th, 1865, an act was approved providing for the organization of the Marion Criminal Circuit Court. 3 Ind. Stat. 172. This act does not seem to provide for the trial of such causes on appeal, nor give the court appellate jurisdiction in such cases. But on the same day an act was approved amending the original justices' act, by which sec. 10 thereof, above cited, was made to read as follows:

"Any prisoner against whom any punishment is adjudged, may appeal to the court of common pleas of the county at any time within thirty days next after the trial, on entering into a recognizance to appear at the next term of such court, as in other cases; and such appeal shall stay all proceedings, and in case there be a criminal circuit court in such county, the appeal shall be taken to it within such thirty days on entering into recognizance to appear forthwith in said circuit court as in other cases, and such appeal shall stay all proceedings." 3 Ind. Stat. 320.

This statute clearly authorizes appeals in such cases, from justices to the criminal circuit court; and we think it is as clearly implied that, when such causes are thus appealed, the latter court shall have power to hear and determine them.

The right of appealing causes to a given court necessarily implies the power on the part of the court, to which such appeals are authorized, to hear and determine such causes on appeal. We are of opinion, therefore, that the appeal from the justice to the criminal circuit court was authorized, and that the latter court had power and jurisdiction to try the cause on appeal. Such causes may, doubtless, be tried by the court, a jury being waived, or by jury as in other cases. This was tried by a jury. We are also of opinion that the

Wachstetter v. The State.

cause was properly tried on the original affidavit, and that no indictment was necessary. When such causes were appealed exclusively to the court of common pleas, they were tried in the latter court on the original affidavit, without information. *Pratt v. The State*, 7 Ind. 625.

The principle of that case is entirely applicable in this. In the common pleas an information was the foundation of an original prosecution in that court. So, in a criminal circuit court, an indictment is the foundation of an original prosecution in that court. But on appeal to either of such courts from a justice of the peace, in such cases, the affidavit filed before the justice is the foundation of the prosecution. Unless some different provision is made by law, causes are tried on appeal on the original papers.

Some other questions are made in respect to the sufficiency of the recognizance, it being conditioned for the appearance of the appellant at "the (then) present term" of the criminal circuit court, instead of "forthwith," as provided by the statute above quoted. The argument of the appellant on this point, as we understand it, is that the giving of such a recognizance as is required by the statute is a condition precedent to the right of appeal; and that as the appellant never entered into such recognizance, he never really appealed, and, hence, never subjected himself to the jurisdiction of the court to which the supposed appeal was taken. We are of opinion, however, that as the appellant had the full benefit of his appeal in all respects as completely as if his recognizance had been within the literal terms of the statute, he is estopped to say that he did not appeal and thereby subject himself to the jurisdiction of the court below. A party cannot thus occupy two antagonistic positions. He cannot appeal in fact, and have all the benefit to be derived therefrom, and then be heard to say, because of some informality in his proceedings to obtain the appeal, that he never appealed at all, and thereby escape the consequences of his appeal. He cannot be allowed "to blow hot and cold," to affirm at one time and deny at another. The

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maxim "*Allegans contraria non est audiendus*" applies. The appellant affirmed by his acts and conduct that he appealed, and had the benefit of his appeal. He cannot now be heard to affirm the contrary. Besides this, the recognizance would most likely have been held abundantly good, although not in the precise terms of the statute. *Ott v. The State*, 35 Ind. 365. There is no error in the record.

The judgment below is affirmed, with costs.*

X *W. Gordon, T. M. Browne, R. N. Lamb, and J. N. Kimball*, for appellant.

J. C. Denny, Attorney General, and *R. P. Parker*, for the State.

*Petition for a rehearing overruled.

ZOUKER v. WIEST.

NEW TRIAL.—*Newly-Discovered Evidence.*—The discovery of new evidence which is merely cumulative is not a good cause for a new trial.

CUMULATIVE EVIDENCE.—*Definition.*—Cumulative evidence is evidence of the same kind and to the same point as that already or previously given.

APPEAL from the DeKalb Circuit Court.

DOWNEY, J.—This is a complaint by the appellant against the appellee, under section 356, 2 G. & H. 215, for a new trial.

There was a demurrer to the complaint, which was sustained by the court, and final judgment rendered for the defendant. The sustaining of the demurrer is the error assigned. The complaint is sworn to by the plaintiff. It sets up as a cause for a new trial the discovery of new and material evidence after the former trial, and is accompanied by the affidavits of the newly-discovered witnesses. We are not furnished with any brief from the appellee, and do not therefore know what the objection urged in the circuit court to the complaint was. The newly-discovered evidence is evidence to prove admissions made by the appellee relating to the

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matter in difference between the parties. If the ground of objection to the complaint was that the new evidence was only cumulative, we think the objection was well taken. The appellant, himself, according to the complaint, testifies to admissions made by the appellee, as to the amount which he had paid on the contract, and this is the point to which the newly-discovered evidence relates. The discovery of new evidence which is merely cumulative, is not a good cause for a new trial. *Fox v. Reynolds*, 24 Ind. 46. There are many more cases to the same effect.

Cumulative evidence is evidence of the same kind, and to the same point, as that already or previously given in the cause. 1 Greenl. Ev. 4, sec. 2.

We think it doubtful, at least, whether there is such surprise shown on account of the testimony of the appellee on the trial, as would justify the granting of a new trial in order to admit newly-discovered evidence in opposition to his statements. As it appears that payments had been made on the contract, it would seem but reasonable that the appellant should have anticipated evidence on that subject, and been prepared to meet it. The showing in the complaint of diligence in getting or attempting to get evidence on the point is not very satisfactory. There would scarcely be any end to litigation, if parties were not held to a reasonably strict rule with reference to the preparation of causes and the production of the evidence at the trial. We can not say that there was any error in sustaining the demurrer to the complaint.

The judgment is affirmed, with costs.

J. J. Best and *C. A. O. McClellan*, for appellant.

J. Morris, for appellee.

Williams v. The Greensburgh and Columbus Turnpike Co. *et al.*

WILLIAMS v. THE GREENSBURGH AND COLUMBUS TURNPIKE
COMPANY ET AL.

For the points decided in this case, see *Hopkins v. The Greensburgh, etc. Turnpike Company*, 40 Ind. 44; *The Greensburgh, etc., Turnpike Company, v. Sidener*, 40 Ind. 424; *Manford v. The Pleasant Grove, etc., Turnpike Co.*, *post*, p. 293; and *Pavy v. The Greensburgh, etc., Turnpike Company*, *post*, p. 400.

APPEAL from the Decatur Common Pleas.

OSBORN, C. J.—We have read the record in this case, and it is covered by *Hopkins v. The Greensburgh, etc., Turnpike Company*, 40 Ind. 44; *The Greensburgh, etc., Turnpike Company v. Sidener*, 40 Ind. 424; *Manford v. The Pleasant Grove, etc., Turnpike Company*, *post*. p. 293; *Pavy v. The Greensburgh, etc., Turnpike Company*, *post*, p. 400. The first two cases cited were thoroughly considered, and have been followed and adhered to. We think the question of estoppel should be considered as settled on that state of facts in such cases. The other cases settled the question of the power of the board of equalization in the appellate court to assess lands omitted by the assessors. We held that they had no such power. We still adhere to the rulings in those cases, and do not think any useful purpose can be accomplished by reconsidering them.

Counsel for the appellee desire us to distinguish this case from those. They seem to think that the averments in the answer in the case at bar are such as to estop the appellant from setting up and relying upon the facts alleged in his complaint. The answer relied upon alleges that certain things were done by each of the parties after the defective assessment was made and filed, and then avers, "that said plaintiff had full knowledge of said facts, stood by," etc. That is far from being an averment that he had knowledge of the omission to assess all the lands liable. "Said facts" referred to such as had been mentioned in the answer.

The failure to aver knowledge of the omission to include all the lands liable to be assessed, was the point upon which

Scary v. Brush.

the *Sidener* case turned. That was a much stronger case in favor of an estoppel than the one at bar.

The appellees have pleaded in bar of the appeal, that since the appeal, and since filing the transcript, the appellant attended an election for directors of the company, and voted the whole amount of the tax assessed against him.

The facts alleged cannot affect the errors of the court below. They do not release or waive them. What effect such acts will have upon the appellant's case, on the next trial, if properly pleaded, *puis darrein continuance*, is quite another thing. That question is not before us, and we intimate no opinion upon it either way.

The judgment of the said common pleas court is reversed, with costs, with instructions to sustain the demurrer to the first paragraph of the answer of said appellee, and for further proceedings in accordance with this opinion.

J. S. Scobey and O. B. Scobey, for appellant.

J. Gavin and J. D. Miller, for appellees.

SCARY v. BRUSH.

COSTS.—*Appeal from Justice of the Peace.*—On appeal from a justice of the peace to the circuit court or court of common pleas, where the plaintiff has failed to recover before the justice, and again fails on appeal, the defendant is entitled to judgment against the plaintiff for full costs.

APPEAL from the Boone Circuit Court.

DOWNEY, J.—Brush sued Scary before a justice of the peace, for twenty dollars, and was beaten. He appealed to the common pleas, where he was again beaten. But the court rendered judgment that each party pay his own costs. The question as to the correctness of this ruling is the only question in this case.

The Jeffersonville, Madison, and Indianapolis R. R. Co. *v.* Huber.

We think it quite clear that the ruling of the court was wrong. Costs follow judgment in the common pleas or circuit court on appeal from the judgment of a justice of the peace, as a general rule. 2 G. H. 597, sec. 70. There are two exceptions to the rule, but this case does not fall within either of them.

The judgment as to costs is reversed, with costs, and the case remanded, with instructions to render judgment in favor of the appellant for full costs.

J. E. McDonald, J. M. Butler, and E. M. McDonald, for appellant.

THE JEFFERSONVILLE, MADISON, AND INDIANAPOLIS RAILROAD
COMPANY *v.* HUBER.

RAILROAD.—*Injury to Animal.—Fence.*—Where an animal is killed on a railroad at a point where the railroad crosses a public highway, where the road cannot be legally fenced, the owner of the animal cannot recover on account of the road not being fenced.

SAME.—*Negligence.*—To entitle the owner of an animal killed on a railroad, at a point where the road could not be legally fenced, to recover therefor, he must show negligence on the part of the railroad company and the absence of negligence on his part.

SAME.—Where the owner of an animal has been guilty of such negligence as to allow it to stray upon the track of a railroad at a point where it cannot be legally fenced, and it is killed, he cannot recover unless the animal was killed by the gross negligence or wilfulness of the railroad company.

APPEAL from the Morgan Common Pleas.

DOWNEY, J.—This was an action brought by the appellee against the appellant, before a justice of the peace of Johnson county, to recover the value of a cow, owned by the plaintiff, which was killed by the cars of the railroad company on its railroad track. The right to recover in the first paragraph of the complaint is based on the failure of the railroad company to fence its road; and, in the second paragraph, on the negligence of the company.

The Jeffersonville, Madison, and Indianapolis R. R. Co. v. Huber.

After a judgment for the plaintiff before the justice of the peace, the company appealed to the Johnson Common Pleas. In that court there was a trial by jury, a verdict for the plaintiff, a new trial granted on motion of the defendant, another trial by jury, in which the jury failed to agree, and a change of venue granted, on the application of the defendant, to the Morgan Common Pleas. In the last named court there was a trial by jury, a verdict for the plaintiff, a motion by the defendant for a new trial overruled, and final judgment rendered for the plaintiff. The evidence and instructions are in the record by a bill of exceptions.

Among the reasons for a new trial, it was urged that the court had erred in its direction to the jury, and that the evidence was not sufficient to sustain the verdict.

The error assigned is, that the court improperly overruled the motion of the defendant for a new trial.

We think it quite clear that the first paragraph of the complaint was not sustained by the evidence. The animal was killed at a point where the railroad crosses a public highway and where, consequently, the company could not legally fence its road. The plaintiff resided in the city of Franklin, two squares from the railroad, and there are streets and alleys leading from where she lived to the railroad. The cow was milked about five o'clock in the evening, and allowed to stray off and go upon the railroad, where she was killed at about six o'clock the same evening by a passing train. The evidence showed that the train was running at the rate of about twenty miles an hour, and that those in charge of it did not slacken the speed of the train, blow the whistle, or ring the bell. It was not shown that those managing the train saw the cow in time to make use of any means to prevent the collision. To recover on the second paragraph of the complaint, it was not only necessary that the plaintiff should show negligence on the part of the defendant, but also the absence of negligence on her part. According to the case of *The Indianapolis, etc., R. R. Co. v. Harter*, 38 Ind. 557, decided by this court, the plaintiff was

The Jeffersonville, Madison, and Indianapolis R. R. Co. *v.* Huber.

guilty of such negligence in allowing the cow to stray upon the track of the railroad at a point where it could not legally be fenced, that she can not maintain the action, unless the animal had been killed by the gross negligence or wilfulness of the defendant.

The defendant requested the court to give the following instruction, which the court refused to give: "If you believe from the evidence that the state road was fifty feet wide at the point where the same crosses the defendant's road, the defendant is not required to fence her road inside of said fifty feet, and if plaintiff's cow passed on to defendant's road, and was struck by the engine at the crossing of said state road and defendant's road, and inside of said fifty feet of state road, the defendant is not liable for the killing of said cow, unless you should find that the defendant was guilty of gross negligence." In our opinion this instruction, when considered in connection with the evidence of negligence on the part of the plaintiff, in allowing the cow to stray upon the railroad, is correct, and should have been given. Owners of cattle residing and keeping their cattle in the vicinity of points upon the line of railroads where the companies can not legally fence their roads, must be charged with the duty of taking some care to keep them off the railroads.

The judgment is reversed, with costs, and the cause remanded, with instructions to grant a new trial.

G. M. Overstreet, A. B. Hunter, T. W. Woolen, and C. Byfield, for appellant.

W. C. Sandefur and G. M. Overstreet, Jr., for appellee.

Mathews v. Norman, et al., Adm'rs.

MATHEWS v. NORMAN, ET AL., ADMINISTRATORS.

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PLEADING.—Evidence.—Agreement to pay Attorney's Fees.—Where a promissory note contains an agreement to pay attorney's fees, such agreement should be alleged in the same paragraph of complaint that asks a recovery on the note; and evidence is admissible in support of such averment.

AGREEMENT TO PAY ATTORNEY'S FEES.—An agreement in a promissory note to pay reasonable attorney's fees if the holder is required to resort to legal proceedings to collect the note, is valid.

APPEAL from the Floyd Common Pleas.

OSBORN, C. J.—The appellees in this case sued the appellant upon three promissory notes, executed by him, payable to them as administrators of the estate of John B. Norman, deceased. Each of the notes contained a provision that if it had to be collected by law, the judgment of the court should include a reasonable attorney's fee for bringing the suit and collecting the amount due. The complaint was in three paragraphs, one upon each note. In each paragraph, there was an allegation of the value of the attorney's fee, and that the note was due and unpaid.

Separate motions were filed to require a division of each paragraph of the complaint into separate paragraphs; to strike from each paragraph of the complaint all that related to the payment of attorney's fees. Separate demurrers to the part of each paragraph of the complaint included in the motion to strike out; separate demurrers to the whole of each paragraph of the complaint in the order stated, and overruled. Separate answers of general denial were filed to each paragraph of the complaint. The cause was tried by the court, resulting in a finding for the appellees for the amount of the notes with interest and attorney's fees. A motion for a new trial was filed and overruled, and final judgment rendered on the finding. Proper exceptions were taken to the several rulings of the court, and bills of exceptions filed.

There is no error in the record. The agreement to pay attorney's fees was a part of the contract and cause of action.

Brooks v. Harris.

It was not necessary to state it as a separate cause of action. To do so would uselessly add to the record. *Johnson v. Crossland*, 34 Ind. 334. The allegation was necessary to entitle the appellees to a recovery for it. *Bowser v. Palmer*, 33 Ind. 124. And evidence was properly admitted in support of the averment. A special demurrer to a part of a complaint will not lie. *Estep v. Estep*, 23 Ind. 114; *Smith v. The Muncie National Bank*, 29 Ind. 158; *Voorhees v. Hushaw*, 30 Ind. 488; *O'Haver v. Shidler*, 26 Ind. 278.

An agreement to pay reasonable attorney's fees, if the holder is required to resort to legal proceedings to collect the note, is valid. *Smith v. Silvers*, 32 Ind. 321; *Billingsley v. Dean*, 11 Ind. 331.

The judgment of the said Floyd Common Pleas is affirmed, with costs and five per cent. damages.

G. V. Howk and *W. W. Tuley*, for appellant.

M. C. Kerr and *W. F. Hisey*, for appellees.

BROOKS v. HARRIS.

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JUSTICE OF THE PEACE.—*Appeal.—Application for.*—On an application made under sec. 68. p. 597, 2 G. & H., for an order to authorize an appeal from a judgment of a justice of the peace, it may be said that a party has been prevented from taking an appeal by circumstances not under his control, when it clearly appears that he did not know within the time allowed for taking the appeal that the suit had been brought or judgment rendered.

SAME.—*Set-Off Pending Appeal to Supreme Court.*—Where a judgment has been rendered before a justice of the peace, and the defendant has applied for an order to allow an appeal, which order has been refused, from which refusal an appeal has been taken to the Supreme Court; while the appeal is pending, an order made in the court below, setting off the judgment from which an appeal is sought against a like amount due on a judgment in favor of the defendant in the former judgment and against the plaintiff in said judgment, will have no effect on the appeal.

SUPREME COURT.—*Petition for Rehearing.*—It is too late to present a question in the Supreme Court for the first time on a petition for a rehearing.

APPEAL from the Marion Common Pleas.

WORDEN, J.—The record in this case shows that on the 18th of March, 1871, the appellee, Harris, recovered a judgment against the appellant, Brooks, for the sum of eighty-one dollars and eighty cents, with costs, before a justice of the peace of said county; that on the 9th of May, 1871, Brooks applied to the court of common pleas on affidavit for an order for an appeal in said cause to the court of common pleas; but on the 18th of May, 1871, the application was overruled and dismissed; that on the 1st of June, 1871, Brooks prayed an appeal to this court, which was granted, and on the 9th of the same month he filed his appeal bond as required, and on the 5th of August he filed the transcript in this court, with errors assigned thereon.

To the errors assigned the appellee pleaded that the appellant ought not further to prosecute his appeal in the action, because the judgment of the justice which he is asking to be allowed to appeal from was, on the 9th of September, 1871, fully satisfied, by having set off against the same a judgment of like amount in favor of the appellee against the appellant, by order of the Marion Court of Common Pleas, as shown by a transcript of the record of the proceedings of the court in that behalf; that no steps have been taken to appeal from the order of the court setting off the judgments against each other. It appears by the transcript of the record referred to, that on the 9th day of September, 1871, in an action instituted for that purpose, in which Harris was plaintiff and Brooks defendant, the court made an order or judgment setting off the judgment sought to be appealed from, against a like amount due on a judgment which the State, on the relation of Brooks, had recovered against Harris and his sureties on an official bond as constable, on the 13th of January, 1871, in said court of common pleas.

It will be seen that at the time the set-off was ordered, the appeal to this court had been perfected, and the cause was regularly pending here. Without deciding what might

have been the effect of the order making the set-off, had it been made before the appeal had been taken to this court, we are of opinion that the order made while the appeal was pending can have no effect upon the appeal whatever. Hence, the demurrer which was filed to the answer must be sustained. The demurrer to the answer is sustained, at the costs of the appellee.

DOWNEY, J.—This was an application by the appellant to the common pleas, made on the 9th day of May, 1871, for an order authorizing him to appeal from the judgment of a justice of the peace rendered against him in favor of the appellee, under section 68, p. 597, 2 G. & H. The judgment was rendered on the 18th day of March, 1871, by default, on a return of service by leaving a copy of the writ at the last usual place of residence of the appellant.

The appellant states in his affidavit on which the motion was based, that he had no knowledge of the rendition of the judgment whatever until the 29th day of April, 1871, being after the expiration of thirty days from the rendition of said judgment; that he had no notice of the commencement of said suit; that he never saw any copy of the summons, if any was left at his residence, nor did any of his family see the same, as he is informed and believes, nor was he ever informed, prior to the said 29th day of April, 1871, by any person whatever, that a summons had been left for him; that he believes the appellee concealed from him the rendition of said judgment until after said thirty days from the rendition of the same, to prevent him from appealing. He also states that he has a meritorious defence to said action, and sets out the nature thereof.

The court overruled his motion, and he excepted to the ruling of the court, appealed, and has assigned such ruling as error in this court.

The statute provides, that "appeals may be authorized by the court of common pleas or circuit court, after the expiration of thirty days, when the party seeking the appeal has

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been prevented from taking the same by circumstances not under his control." It was too late for the appellant to move to set aside the default, when he got notice that he had been sued and that a judgment had been rendered against him. 2 G. & H. 593, sec. 62. If he had any remedy, it was that which he has chosen. He can not appeal without executing a bond with security to secure the payment of the judgment against him on appeal.

The statute authorizes service of the summons by leaving a copy thereof at the last usual place of residence of the defendant, except when the defendant has left his usual place of residence for an uncertain period, or a period certain but extending beyond the return day of the summons, and the constable is apprised thereof, in which case he can not serve by copy. 2 G. & H. 582-3, secs. 22, 23.

When service has been made as required by the statute, it is legal service whether the defendant acquires actual knowledge of the fact of such service before the return day or not. *Pendleton v. Vanausdal*, 2 Ind. 54. We can see, however, that great hardship might result if it should be held that the defendant could not appeal from the judgment rendered against him under the circumstances disclosed in the affidavit in this case. We think it may be said that the party has been prevented from taking the appeal by circumstances not under his control, where it clearly appears that he did not know that the suit had been brought, or the judgment rendered, within the time allowed for taking the appeal. It seems to us that the court should have authorized the appeal. *Baragree v. Cronkhite*, 33 Ind. 192.

The judgment is reversed, with costs, and the cause remanded.

ON PETITION FOR A REHEARING.

DOWNEY, J.—A petition for a rehearing is filed in this case by the appellee, based on grounds not assumed in the first hearing of the cause. In *Yater v. Mullen*, 24 Ind. 277, this court said, FRAZER, J., delivering the opinion of the

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court: "It is, by the well settled practice of this court, too late to present a question for the first time on a petition for rehearing, and in consenting to consider that question, in the present instance, we do not mean to make an innovation which shall be regarded as a precedent in future cases." The rule has been recognized in other cases, one of which is *Heavenridge v. Mondy*, 34 Ind. 28. The rule is convenient, if not necessary to the proper despatch of business. We think it should be applied in this case.

The petition is overruled.

J. M. Johnston, for appellant.

C. H. Test, D. V. Burns, and G. S. Wright, for appellee.

BRANHAM ET AL. v. RECORD.

CONTRACT.—*Donation to Railroad Company.—Change in Line of Road.—Construction of Contract.*—In a suit upon a contract to donate and pay to The Indianapolis and Vincennes Railroad Company a certain amount of money, when the railroad company should have completed her railroad through Morgan county and have the same ready for the running of cars, "provided, always, that said railroad be located and made as nearly as practicable on the grade of the Indianapolis branch of the New Albany and Salem Railroad from Indianapolis to Gosport, making Mooresville, Brooklyn, Centerton, and Paragon points;"

Held (Downey, J., dissenting), that when the railroad company had built its road through Morgan county and completed it for the running of cars through that county, and had made Mooresville, Brooklyn, Centerton, and Paragon points on the road, the defendant was liable to pay the amount agreed to be donated, and it was not necessary that the old grade of the branch road should have been occupied further than to make these places points.

PRACTICE.—*Motion for New Trial.—Assignment of Error.*—If a motion for a new trial states the reasons on which it is based, a general assignment of error for overruling the motion brings them before the court for examination and judgment. If reasons which might be properly stated in such motion are omitted, assigning them for error will not make them available in the Supreme Court.

FRAUD WITHOUT DAMAGE.—Fraud without damage constitutes no ground of defence.

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APPEAL from the Morgan Common Pleas.

OSBORN, C. J.—The Indianapolis and Vincennes Railroad Company sued the appellee upon the following contract:

“For and in consideration of the benefits that the public in general, and we in particular, will derive from the construction of a first-class railroad from Indianapolis to Vincennes, we, the undersigned, agree to give, donate, and pay to The Indianapolis and Vincennes Railroad Company, the amount annexed to our names, respectively, when said railroad company shall have completed said railroad through Morgan county, Indiana, and have the same ready for the running of the cars through said county: Provided, always, that said railroad be located and made as nearly as practicable on the grade of the Indianapolis branch of the New Albany and Salem Railroad, from Indianapolis to Gosport, making Mooresville, Brooklyn, Centerton, and Paragon points; the same to be collectible without relief from valuation or appraisement laws.

“December 14th, 1865. Jackson Record, \$1,050.”

And Others.

The appellants were afterward substituted as plaintiffs. The complaint was in five paragraphs. Each paragraph sets out and makes the contract a part of the complaint, alleges that the railroad company accepted and acted upon the agreement and subscription, and constructed such first-class railroad, making the places mentioned points thereon; that it was so far completed in accordance with the contract and condition, that on the — day of —, 1868, the same was ready for running cars through said county; that on that day and since, continuously, the cars of the railroad did and have run thereon; and thence hitherto she has operated the same as a railroad, transacting the freight and passenger business of the country along the line of the road through said Morgan county, to and from said city of Indianapolis; that the said subscription of the appellee became and was due on said day, and is, together with the interest thereon, unpaid.

The several paragraphs differ in some particulars. The first states that the company built the road, as far as practicable, along and upon said grade, and did so make Mooresville, Brooklyn, Centerton, and Paragon points thereon.

The second states that she did construct the road by way of those places, making them points thereon, and to a distance of ——— on said grade, south of Centerton; "that at said point, diverging from and leaving said grade, she constructed her said road across White river, and thence along the east side of the same to the town of Martinsville, making said Martinsville a point thereon; thence, proceeding westward and crossing said White river again, at a point some two miles from said town she again intersected said grade, and thence constructed her said road along and upon said grade through to said town of Paragon, making said Paragon a point, and so continuing on said grade, she constructed her said road to the western line of said county, and thence on to the town of Gosport, the terminus of said grade.

"And plaintiff avers that the construction of said road from said point of divergence from said grade, by the way of Martinsville aforesaid, to said point of intersection with said grade, in no wise affects the interest of said defendant, or makes the road less valuable to him."

The third paragraph is like the second, omitting the statement that the divergence, by the way of Martinsville, in no wise affected the interest of the appellee.

The fourth paragraph differs from the third by averring that the construction of the road from the point of divergence from the grade, by the way of Martinsville, was done with the acquiescence and consent of the defendant and with his full knowledge.

The fifth paragraph, after setting out the contract, contains the following:

"That at and before the time of the construction of said road, it was agreed by and between Ambrose E. Burnside, as president and financial agent of the plaintiff, and the people of Martinsville, that if they would give, donate and pay to said

railroad company the sum of thirty thousand dollars, the said plaintiff would locate and construct her said road through said town of Martinsville, making said town a point thereon.

“That thereupon the said defendant and the subscribers living upon the west side of White river, declared their intention not to pay their subscription and donation, and ceased their efforts to secure the sum of fifty thousand dollars by them before agreed to be raised and paid to said plaintiff, in consideration of said road, etc.

“That thereupon the citizens living along and upon the east side of White river, between Martinsville and Indianapolis, proposed to Ambrose E. Burnside, as such president and financial agent, that if said plaintiff would locate and build her said road from Indianapolis to Martinsville on the east side of White river, by the way of Waverly in Morgan county, they, the said citizens living along said proposed route, would give, donate, and pay to the said plaintiff, for the construction of said road, the sum of fifty thousand dollars.

“Thereupon, on learning said facts and understanding that said Burnside was contemplating accepting said proposition, and locating and constructing said road upon the said east side of White river, they, the said defendant and the other subscribers upon the west side of White river, consulted and agreed with said plaintiff, that the location of said road might be changed so as to diverge from said old grade at a point below and south-west of said Centerton, cross White river to the east side, and run by Martinsville, and that they would pay to said plaintiff to the amount of their said subscription, before that time by them agreed to be paid.

“That thereupon said plaintiff, accepting and acting upon said agreement and contract as modified as above described, proceeded to and did construct her railroad in pursuance thereof, and in accordance with every particular thereof, and did make Mooresville, Brooklyn, Centerton, Martinsville, and Paragon, in Morgan county, points thereon, and did locate

and construct the same upon said old grade from Indianapolis to Gosport, except between the points of divergence, as above described. And said plaintiff expressly avers that said divergence was by and with the consent and agreement of said defendant and said other subscribers upon the west side of White river."

It then avers the completion and use of the road as in the others.

Demurrers were filed and sustained to the second, third, fourth, and fifth paragraphs of the complaint, and the appellants excepted.

The appellee answered in four paragraphs. The first is a general denial.

The second admits the execution of the contract and avers that prior thereto The New Albany and Salem Railroad Company had located the branch mentioned through the towns named in the contract to be made points, and the entire line thereof on the west side of White river, in said county, and had made the grade, etc., on the line so located; that the grade then remained and was unoccupied, ready to be used by said railroad company, the appellants' assignor, and was practicable in its whole length and proper to be used; that the company, on the — day of —, did locate its road upon said grade; that afterward, in consideration of thirty thousand dollars paid and secured to be paid by the town of Martinsville, the company changed the location so as to place the line of its road from a point five miles above and north of said town of Martinsville, on the east side of White river, and abandoned the said location, grade, etc., between said towns of Centerton and Paragon, in said county, for eight miles, and constructed and now have the road on such altered line.

The third paragraph avers that the contract was made without any consideration.

The fourth avers that he was persuaded to execute the contract by the representations of the agents of the company, that she had prior thereto located the line of her rail-

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road through said county on the west side of White river and on the grade of the branch railroad, and would permanently construct and operate it on that line and grade; that he believed said representations; that the company, in violation of the terms and conditions of said contract and representations, altered and changed the line of her railroad between the towns of Paragon and Centerton, in said Morgan county, on said west side of White river, to the east side thereof, and for a distance of eight miles between said towns did abandon said line and grade of said Indianapolis branch of said New Albany and Salem Railroad; and did fail and refuse to construct her said railroad thereon.

The fifth avers that the railroad company, by its agents, falsely and fraudulently represented to him that she had located her railroad through said county, on the west side of White river and on the grade of the said branch railroad, and would thereon construct the said road; that he, relying upon said representations and believing them to be true, executed the contract; that the road has not been so located, nor did said company construct said road on said grade, but abandoned the same for a distance of eight miles, between the towns of Centerton and Paragon, and for that distance located and constructed her said railroad on the east side of White river.

Demurrers were filed to the second, fourth, and fifth paragraphs of the answer, which were sustained to the fourth and overruled to the second and fifth. Exceptions were duly taken.

The reply was in four paragraphs.

The first was a general denial.

The second averred that the work on the branch railroad referred to was done many years before the execution of the contract; that between the points of divergence in the location of said road from said branch, the old grade had wasted, the bridges decayed, the drains had filled up, and, for a large portion of the distance, no work had ever been done; that the work would be likely to wash away by high water if rebuilt, without an extraordinary expenditure

of money in riprapping the same; that the allignment was very bad, three-fourths of it being curves, with many short ones, some of them in deep cuts and on high hills, and in some places heavy grades reaching almost to the maximum point; that on the east of White river, from the point of divergence on the north to Martinsville, the allignment was good, the same being a straight line all the way; that the surface of the country was level and even, presenting no deep cuts or high fills, making a remarkably easy grade; that the line for construction upon the east side of White river was much shorter, to wit, one mile; the distance from Martinsville south-west to the old grade being required to be constructed any how, to form a junction with the Fairland route; that the location of plaintiff's road upon the east side of White river for said distance made the construction of said plaintiff's road much cheaper, better accommodated the public travel and the transportation of the products of the country in the White river valley and adjacent to said road, and beneficial to the public, the plaintiff, and defendant, and would in no wise injure or inconvenience said defendant, or any other one of the subscribers of donations to said company; wherefore said plaintiff says that it was impracticable to construct the road upon said old grade for said distance, and wholly impracticable as compared with the many advantages presented upon the east side of White river; wherefore said plaintiff located her said road upon said east side of White river for said distance, as she had a right to do under the terms of said defendant's subscription, and all of which said defendant at the time well knew and acquiesced in.

The third paragraph avers that on the — day of September, 1867, the citizens residing upon the east side of White river, between Martinsville and Indianapolis, were very desirous of, and were making an effort to procure the location of said plaintiff's road all the way on the east side of White river, from Indianapolis to Martinsville; that said defendant and the other subscribers of donations upon the

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west side of White river, on the — day of October, 1867, agreed with said plaintiff that the location of said plaintiff's road should remain upon the west side of White river, as far south as Centerton, and that said plaintiff should have the privilege of crossing White river at some point south of Centerton, and going by Martinsville, if she should desire, and the said defendant and the other subscribers on the said west side of White river would guarantee their subscriptions to the amount of fifty thousand dollars, and that the work should commence immediately on the said west side of White river; that in pursuance of said agreement said defendant and other subscribers did guarantee said fifty thousand dollars, and the work did commence immediately on the west side of White river, and was prosecuted without unnecessary delay to completion, according to the terms of said guarantee and agreement; a copy of which guarantee was therewith filed and made a part thereof; that said plaintiff, in pursuance of said agreement, retained the location of her road upon the west side of White river to a point south of Centerton, from which point she crossed White river to the east side, and located her road through Martinsville, as she had a right to do under the terms of her said subsequent agreement, and all of which said defendant at the time had full knowledge, acquiesced in, and consented to.

The fourth paragraph avers that she admits that the line of the said road was varied from the line of the said old grade, as set forth in the second paragraph of said answer, but says that before the delivery of the contract sued on, it was agreed by and between the said defendant and his co-obligors thereon and the plaintiff, that the divergence and change should be made in the manner aforesaid; that relying upon the good faith of said defendant and said others, she so builded and constructed said road in manner aforesaid; that the said defendant and said others stood by, so agreeing, as aforesaid, with a full knowledge of the facts, and made no objections to the same being so constructed.

The appellee demurred to the second, third, and fourth paragraphs of the reply. The demurrers were sustained to the second and third, and overruled to the fourth. Proper exceptions were taken. The appellee also filed a general denial to the answer to his cross complaint.

It was after the issues were thus formed that the appellants were substituted as plaintiffs.

The cause was tried by a jury, and resulted in a verdict for the appellee. A motion for a new trial was filed and overruled, and proper exceptions taken, and final judgment rendered on the verdict.

The reasons assigned for a new trial were for refusing to give instructions asked, and for giving other instructions specified in the motion; for refusing competent evidence offered by them, and for receiving incompetent evidence offered by the appellee; that the verdict was not sustained by the evidence, and was contrary to law.

The errors assigned by the appellants are,

1st. In sustaining demurrers to the second, third, fourth, and fifth paragraphs of the complaint.

2d. In overruling the demurrers to the second, third, and fifth paragraphs of the answer.

3d. In sustaining demurrers to the second and third paragraphs of the reply.

4th. In overruling the motion for a new trial.

There are ten other assignments, but they are all included in the fourth. They are reasons why the new trial should have been granted. If the reasons are not stated in the motion for a new trial, assigning them for error will not make them available in this court. If they are so stated, the general assignment of error for overruling the motion brings them before the court for examination and judgment.

The decision of the case depends principally upon the construction of the contract sued on. If we can determine what the parties meant by that contract, we can dispose of most of the questions discussed by counsel. We shall be aided very

much in arriving at a correct conclusion of that, by ascertaining the intention and purposes of the parties.

By the contract, we learn that the railroad company was engaged in the construction of a railroad from Indianapolis to Vincennes, in this State; that, at some time before the execution of the contract, work had been done upon a branch railroad running through Morgan county; that Mooresville, Brooklyn, Centerton, and Paragon were towns along the line of that branch; that the appellee was desirous of having the railroad built from Indianapolis to Vincennes, and that those four towns should be made points on the road, and we think we may also infer that the company lacked the means to build the road. The purpose of the company was to build the railroad, and the appellee believing that its construction would benefit the public, and himself in particular, in consideration of such benefits, agreed to donate and pay to the company the sum of one thousand and fifty dollars when the road should be completed through Morgan county, ready for the running of cars through that county. The difficulty arises on the proviso. That required that the railroad should be located and made, as nearly as practicable, on the grade of the branch mentioned, making those four towns points. The body of the contract is plain enough. That is a promise to pay when a certain portion of the road is built.

If we were to consider the word "grade" in its primary or strict sense, perhaps it might be held to mean the rise and descent of the branch railroad, its levels; but we think it was not used in that sense. We think it was used with reference to the line of the road, as distinguished from gradient, or rise and descent. If we adopt the same rule with reference to the word "practicable," we shall find that it may be used to express different meanings by contracting parties. To ascertain by reading a contract what a word means, it is a safe rule to consider the whole contract, and from it determine the objects and purposes of the contracting parties, and to put such meaning upon the words used as will secure the accomplishment of those purposes and

objects and carry out the intentions of the parties. Even the literal terms of a contract will sometimes be controlled by what appears to be the real intentions of the parties to it. *Parkhurst v. Smith*, Willes, 327; *Tatlock v. Harris*, 3 Term R. 174; Chitty Con. 89. The object aimed at in construing a contract is to discover and give effect to the intention of the parties. Words ought to be governed by the intention. Chitty Con. 78. Another rule of construction is, that terms used in a contract shall prevail according to their most comprehensive popular sense, unless there be something to show that they were used in one which is more confined. Another rule is, that every contract is to be construed with reference to its object and the whole of its terms, and accordingly the whole context must be considered in endeavoring to collect the intention of the parties, even although the immediate object of inquiry be the meaning of an isolated clause or word.

Putting ourselves in the place of the contracting parties, as nearly as we can by the contract, let us endeavor to ascertain and determine what they meant by the words "located and made, as nearly as practicable, on the grade," etc. To do so, we must, as we have seen, look to the whole contract.

Taking the whole contract together, including the proviso, we think that the main purpose of the appellee was to secure the construction of the railroad, and if practicable, through the towns named in the proviso. To adopt the construction contended for by the appellee, and as given by the court below, makes the actual occupancy and use of the old road-bed the entire distance between stations material. There is nothing in the contract requiring such a construction; nothing indicating any purpose to make the adoption of the line of that branch railroad a condition, or desirable, only so far as to make the towns mentioned points on the new road. The completion of the railroad, ready for the running of cars through Morgan county, and to and through those towns, so as to make them points on it, and give them and the county

the facilities of a railroad, was all that the appellee was seeking to accomplish by his proposed donation. To require the company to adopt the old road-bed between stations, or otherwise than to run to those places, or to prevent it from building its road to other points, towns, or cities, or from making connections with other roads, or from locating and constructing its road with a view to the public benefit and its own profit, does not seem to have been contemplated by the terms of the contract. They were all proper elements to be considered, even if we give the word or phrase the more literal or strict signification. We can understand why it was considered important and of value to the appellee and the public, that the road should touch at and run to towns and cities, and that he should desire to contract that it should do so, as a condition to the payment of his subscription; but it could make no difference to him or the public what particular ground it occupied for its road-bed between those points, except that it should be the best for its own and the public interest, both of which, when rightly understood and acted upon, are in entire harmony.

The construction contended for by the appellee gives the railroad company no discretion in the selection of the ground to be occupied for the road. Even if it could be made upon as good ground as the grade of that branch, and if its construction upon such ground would be far more advantageous and beneficial to the company, the public, and the appellee, still, according to the construction contended for, its selection would defeat the collection of the money. Under such a construction the company was not only required to construct its road through those towns, but it must actually locate and make it upon the precise road-bed, if, in an engineering point of view, it was practicable to do so.

It is said that the appellee was interested in preventing the construction of the road to Martinsville, and in building up the towns named as its rivals, and on that account it was material to him to have the road built on the old grade all the way. Inasmuch as no such motive or purpose appears

in the contract, we will not by construction impute it to him. By the contract he sought to secure the construction of the road to certain towns, and not to prevent its construction to others.

The proviso may, we think, be paraphrased and read, that said railroad shall be located and made, as nearly as practicable, on the grade of the Indianapolis branch of the New Albany and Salem Railroad from Indianapolis to Gosport, "so as to make," or "which will make," or "thereby making" Mooresville, * * * points, without materially changing its meaning, although it would be a little more apparent.

When the railroad company had built its road through Morgan county and completed it for the running of cars through that county, and had made Mooresville, Brooklyn, Centerton, and Paragon points on the road, the defendant was liable on his contract, and all the rulings of the court based upon the construction of the contract, which required that the old grade of the branch road should be occupied otherwise than to make those places points, were erroneous.

We have not deemed it necessary to discuss any of the pleadings, in particular, because the rulings upon all of them were based upon the same theory, except those denying the consideration and setting up the fraud.

As to the fifth paragraph of the answer, it alleges false representations and fraud about the location of the road, that it had been located on the west side of the river; and yet he requires in his contract that it should be thereafter located. Again, he fails to show any damage resulting to him by reason of the failure to construct the road on that line. Fraud without damage is no ground of defence. *Wiley v. Howard*, 15 Ind. 169; 2 Parsons Con. 771.

We do not deem it necessary to discuss or pass upon any of the questions involved in the motion for a new trial, as under the construction given to the contract all that relates to the practicability of locating and making the road upon

the grade of the branch road will be excluded. As it seems to be admitted that the road had been built as provided in the body of the contract, and to the four towns named as points, before the commencement of the action, there will remain nothing to try, unless the appellee shall amend his fifth or some other paragraph of his answer, so as to raise some other issue than is now raised by the pleadings. The questions raised by the instructions to the jury are disposed of by the construction given to the contract.

The judgment of the said Morgan Court of Common Pleas is reversed, with costs; cause remanded, with instructions to grant a new trial, overrule the demurrer to second, third, fourth, and fifth paragraphs of the complaint, and to sustain the demurrer to second, fourth, and fifth paragraphs of the answer, and for further proceedings in accordance with this opinion and judgment.

DOWNEY, J.—I am unable to agree with the majority of the Court in the view which they have taken of this case. Upon the performance of certain acts by the company, constituting conditions precedent, the appellee, Record, promised to pay a certain amount of money. The part of the contract upon which the difference of opinion arises, is as follows: "Provided always that said railroad be located and made as nearly as practicable on the old grade of the Indianapolis Branch of the New Albany and Salem Railroad, from Indianapolis to Gosport, making Mooresville, Brooklyn, Paragon, and Centerton points." There are two things plainly stipulated for in this clause of the contract. 1. That the railroad be located and made as nearly as practicable on the old grade, all the way from Indianapolis to Gosport; and 2. That Mooresville, Brooklyn, Paragon, and Centerton shall be made points. The route stipulated for is all on the west side of White river. The deviation from the line of the route contracted for commences some five miles above the town of Martinsville, crosses White river near that point, over an expensive bridge, and runs to Martinsville, a dis-

tance of five miles, at which place it is not less than one and a half or two miles from the line mentioned in the contract. Leaving Martinsville, going in the direction of Gosport, it runs two miles, then again crosses the river, over another expensive bridge, and near that point intersects the route mentioned in the contract. The pleadings and evidence show clearly and conclusively that the deviation from the agreed route was not on account of any impracticability in the route, but was for a consideration of thirty thousand dollars paid to the company by the town of Martinsville, or parties interested in having the road made to that place. The evidence shows also that there was a rivalry between the route on the west side of the river and a route on the east side, which contemplated Martinsville as a point, and hence the very pointed stipulation in the contract requiring the railroad to be made on the old route, or as near as practicable to it. In view of these facts the construction of the contract adopted by the majority of the court is, in my opinion, in utter violation of the plain language and evident intention of the parties. The opinion of the majority of the court seems to bring into the case, as an element or circumstance governing them in the construction of the contract, the question of public convenience and whether the company had means to make the road on the agreed route. I utterly deny that these considerations have anything to do with the practicability of constructing the road on the agreed line, within the intention and meaning of the parties. It would be strange if the parties who have agreed to pay sums of money, on condition that the road should be located on the agreed route, can be compelled, after the company has sold out to a rival route, to pay their money to build the road on the rival line. I think the parties subscribing had a right to stipulate for the terms upon which the company should have their money, and that the company must show a compliance with such terms before it can recover. The majority opinion says: "To adopt the construction contended for by the appellee, and given by the court below,

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makes the actual occupancy and use of the old road-bed the entire distance between stations material. There is nothing in the contract requiring such a construction; nothing indicating any purpose to make the adoption of the line of that branch railroad a condition, or desirable, only so far as to make the towns mentioned points on the new road. The completion of the railroad ready for the running of cars through Morgan county, and to and through those towns, so as to make them points on it, and give them and the county the facilities of a railroad, was all that the appellee was seeking to accomplish by his proposed donation. To require the company to adopt the old road-bed between stations, or otherwise than to run to those places, or to prevent it from building its road to other points, towns or cities, or from making connections with other roads, or from locating and constructing its road with a view to the public benefit and its own profit, does not seem to have been contemplated by the terms of the contract. They were all proper elements to be considered, even if we give the word or phrase the more literal or strict signification. We can understand why it was considered important and of value to the appellee and the public that the road should touch at and run to towns and cities, and that he should desire to contract that it should do so as a condition to the payment of his subscription, but it could make no difference to him or the public what particular ground it occupied for its road-bed between those points, except that it should be the best for its own and the public interest, both of which when rightly understood and acted upon are in entire harmony."

Suppose the construction of the contract contended for by the appellee, and given by the court, does require the actual occupancy of the old road-bed the entire distance between stations, as nearly as practicable. Is not this precisely what was contracted for? Not only does the contract require it between stations, but it requires it, in express terms, all the way from Indianapolis to Gosport. Except where that route is impracticable, it was the plain duty of the company to use

it, if it expected to look to the appellee to pay the money promised. I do not perceive how it can fail to be seen that the appellee intended to make the use of the old line essential, as nearly as practicable, both a condition and desirable, as well between the towns named, as at the points where they are situated. We do not know that the appellee did not own lands on the line of the old grade, which by the deviation from the agreed route were damaged, that he had not in view the making of a switch, a station, or a town on the neglected route. At all events, he had a right to make his own bargain, and the terms and conditions upon which he would pay his money, and it is not competent for a court, in view of the interests of the company or of the public, to make a different contract for him. If there is any reason why he desired the road made to the towns named, more than that the road should run on the old grade, as nearly as practicable, all the way from Indianapolis to Gosport, it is not shown. That the court cannot see why the appellant should want the road to run on the old grade, as well between the towns as at the towns, can surely not control the construction of the contract. If he made that a condition, I think that is an end of the controversy. That such is his contract, is very plain to me. But it is urged that the construction contended for by the appellee "gives the railroad company no discretion in the selection of the ground to be occupied for the road." If the court means by this that the company must comply with its contract with the appellee before it is entitled to his money, and that it has no discretion as to this, I agree to that. But if it is meant that the company could not adopt another route, and thus abandon the right to demand the money promised by the appellee on the condition named, then I think otherwise. The company did not obligate itself, at all events, to make the road on the agreed route. The contract was simply that if they did so the appellee was to pay them the money; if not, they could not recover it.

That I am right in the construction of this contract is,

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I think, shown by several cases already decided by this court. I will refer to some of them. *The Evansville, etc., Railroad Co. v. Shearer*, 10 Ind. 244. This case shows that conditional subscriptions of stock (and the same rule applies to donations), in the absence of any special prohibition, have been sustained as authorized by, and not against, public policy. The parties subscribing are not to be considered as stockholders, until the company has performed the condition upon which the understanding depends; and when that is done they become stockholders by force of the agreement of the parties, and the subscription becomes absolute. In that case, the contract was to pay on condition that the road should be permanently located on the east side of White river, within one mile of the road run between Indianapolis and Spencer. The company had made a pretended location of its road in accordance with the agreement, but afterward had resolved to change it. It was held that the company was bound to show a permanent and specific location according to the contract, before it could maintain an action on the same. The court refers to *Fisher v. The Evansville, etc., Railroad Co.*, 7 Ind. 407, and *Gillum v. Dennis*, 4 Ind. 417.

In *The New Albany, etc., Railroad Co. v. McCormick*, 10 Ind. 499, the subscription was on the condition that the company should "locate said railroad through the town of Lafayette, and cross the Wabash river north of Brown street in said town." It was decided that the agreement required the company to cross the river where a northerly line from the street would strike it; but it was not necessary to cross the river in the town unless such line struck the river within the same. In *Shearer v. The Evansville, etc., Railroad Co.*, 12 Ind. 452, the condition was, that the road should be permanently located on the east side of White river, within one mile of the line run from Indianapolis to Spencer, if Martinsville be made a point. The court said: "Upon a careful examination of the testimony, we think it was not proven that the plaintiffs had performed all the conditions. We think the evidence does not show that the road was permanently located 'within one

mile of the line run between Indianapolis and Spencer.' This was an essential part of the condition, as much so as that the road should be located on the east side of White river, or that Martinsville should be made a point." This case is quite in point against the conclusion of the majority of the court in the case under consideration. It gives the party sought to be held liable the benefit of his contract, and does not attempt to make another contract for him. See *Taylor v. Fletcher*, 15 Ind. 80; *Smith v. Allison*, 23 Ind. 366. In *The Evansville, etc., Railroad Co. v. Meeds*, 11 Ind. 273, the condition was, that the road should be permanently located "two miles east of the court-house in Washington." It was held by the court, that the words of the contract plainly indicated an intention that the road should be located just two miles east of the court-house; that they expressed an agreement which, for aught that appeared, the company could have fulfilled in accordance with its terms; that they were not ambiguous, and could not be explained by parol.

In *Parker v. Thomas*, 19 Ind. 213, and again in 28 Ind. 277, the condition was, that the road should be located within one-fourth of a mile of the plat of the town of Westport, etc. It was held that the condition was valid, and that a location within the agreed distance from the town plat was a condition precedent and essential to a recovery.

There is no intimation in any of these cases that questions regarding the pecuniary condition or ability of the company, or the interest of the company, or of the general public, can in any way enter into the question of construction. But each person subscribing has been given the benefit of his contract, by holding the company to a compliance with the plain stipulations thereof. In my opinion the judgment of the majority of the court adopts a wrong construction of the contract, and, without intending to do so, sanctions an act of bad faith on the part of the railroad company.*

T. A. Hendricks, O. B. Hord, A. W. Hendricks, and W. M. Franklin, for appellants.

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S. Claypool, F. P. A. Phelps, S. R. Harryman, W. R. Harrison, and W. S. Shirley, for appellee.

*Petition for a rehearing overruled.

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SCHOOLS.—Statute Construed.—The latter part of sec. 28 of the school law of 1865 (3 Ind. Stat. 449) has no application to incorporated towns and cities.

SAME.—Section 164 of the same act, as far as it provides for appeals to the examiners from the action of the trustees, in dismissing teachers, does not apply to incorporated towns and cities.

SAME.—Power of School Trustees in Incorporated Towns or Cities.—Dismissal of Teachers.—There is no statute requiring or authorizing school trustees in incorporated towns or cities to dismiss teachers.

SAME.—If a school-teacher employed to teach in the public school of an incorporated town or city, for a definite length of time, proves to be incompetent, and unable to teach the branches of study which he or she has been engaged to teach, either from a lack of learning or incapacity to impart learning to others, or if, in any other respect, there is a failure to discharge the obligations assumed by the contract, or implied from the nature of the employment, the school trustees of the town or city may dismiss the teacher from such employment.

SAME.—If a teacher is employed for a definite length of time and has, in all respects, fulfilled the contract, such teacher cannot be discharged, without his or her consent.

PLEADING.—Dismissal of School-Teacher.—Answer.—In an action brought by a person employed to teach in the public school of an incorporated city, to recover for services rendered, the complaint alleging an employment for a definite length of time, an answer alleging that the teacher was dismissed by the school trustees, on charges made against such teacher, the trustees after notice to the teacher having adjudged the charges sustained, was bad.

APPEARANCE TO ACTION.—The filing of a demurrer to a complaint is a full appearance to the action.

SAME.—Effect of Appearance.—A full appearance to an action waives all defects in the process and the service thereof.

APPEAL from the Montgomery Circuit Court.

WORDEN, J.—This was an action by the appellee against the appellant, commenced before a justice of the peace.

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| 49 | 200 |
| 146 | 670 |
| 49 | 200 |
| 146 | 670 |

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Before the justice there was judgment for the plaintiff, from which the defendant appealed to the circuit court, where there was a like judgment.

The complaint contained two paragraphs. The first alleged, in substance, that the plaintiff was employed by the board of school trustees of the city of Crawfordsville to teach in the public school of that city for the period of nine months, commencing September 13th, 1869, and ending June 10th, 1870, at the rate of forty-five dollars per month; that she remained in said employment for the said term of nine months, and has received for said services but the sum of \$337.50, leaving due and unpaid to her the sum of \$67.50; wherefore, etc.

The second paragraph alleged, substantially, that on the — day of September, 1869, the plaintiff was employed by the board of trustees of said city, to teach in the public school thereof, for the term of nine months, at the rate of forty-five dollars per month; that on September 13th, 1869, she entered upon the employment, and continued in the discharge of her duty until the occurrence of the matter hereinafter stated. On April 29th, 1870, she received a written notice from the clerk of the board of trustees, that her services as such teacher were dispensed with, and that her functions as such would then cease. To this notice she paid no attention, but on the following morning she repaired as usual to her school-room and had proceeded so far as calling the roll of her class, when one A. Fullen, who styled himself "Superintendent," ordered her class to leave the room and repair to another part of the building, to be under the care and supervision of another teacher; that on the same day another person, by the order of said Fullen, took possession of the room in which she had always taught, and to which she had been allotted, thus excluding her, against her will, and under her protest, from the school building as a teacher therein; that from that time on, she held herself in readiness to obey any commands of the said board of school trustees, which would restore her to her functions as teacher

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in said public school; that afterward, on May 7th, 1870, she received the following notice, viz.:

"CRAWFORDSVILLE, May 7th, 1870.

"*Miss Abbie Hays*, You are hereby notified to appear before the school trustees of the city of Crawfordsville on the 12th inst., at 4½ o'clock, p. m., in the middle school-room of the frame school building, to answer the following charges against you, to wit:

1. Incompetency as a teacher.
2. Unaptness as an instructor.
3. General conduct unbecoming a teacher, and detrimental to the interest of the public school.
4. An obstinate and determined refusal to comply with and enforce the rules (and counselling resistance to the same) laid down by the trustees for the government of the public schools.

"You are hereby further notified to have present at said time and place such counsel and witnesses as you may deem necessary to you for your defence.

"By order of school trustees,

"R. K. KROUT, Clerk."

She avers that the charges mentioned in the notice were not preferred by a majority of the legally qualified voters at the school meetings of said city, but were simply charges preferred, as she is informed, by the members of said board of school trustees themselves, and were only the emanations of malice on the part of said Fullen; that her services as such teacher were acceptable to the entire body of said voters of said school meetings; that on account of the last mentioned fact, she paid no attention to the notice last mentioned, but wrote to the board of trustees the following letter:

"CRAWFORDSVILLE, Ind., May 10th, 1870.

"*To the School Trustees of the city of Crawfordsville, Ind.:* GENTLEMEN, I hereby notify you that I am still in readiness to continue my functions as a teacher in the public school of this city, and will hold myself in readiness to do so during

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the remainder of the term for which you employed me to teach. Any notice or request from you to continue my teaching will reach me, if addressed to me at Crawfordsville, Indiana.

Very respectfully yours,

"ABBIE HAYS."

That subsequently, on May 13th, 1870, she received the following notice:

"CRAWFORDSVILLE, May 13th, 1870.

"*Miss Abbie Hays*, I have been directed by the school trustees of this city to inform you that said trustees met pursuant to written notice given you, and in default of your appearance, either in person or by attorney, proceeded to hear evidence in the matter of charges preferred against you. After hearing evidence touching said matters of charges, and having carefully considered the same, said trustees adjudged such charges sustained, and thereupon ordered you discharged from further services as teacher in the public schools of this city,

"By order of the board of school trustees.

"R. K. KROUT, Clerk."

That notwithstanding all the foregoing notices, the plaintiff continued to hold herself in readiness to teach as directed by the board of school trustees, so far as they were in consonance with the terms of said contract, and was ever in such readiness until the expiration of the term for which she was employed; that she has received for her services the sum of \$337.50, leaving due and unpaid the sum of \$67.50; wherefore, etc.

On the filing of the complaint, a summons was issued by the justice, returnable July 1st, 1870, which was returned served on June 28th, 1870, by reading to the Mayor and Marshall of the city, and to Robert K. Krout, Clerk of the board of school trustees. On the return day of the summons, the defendant made "a special appearance," and moved "to quash the summons and dismiss the suit, on account of the illegality of the summons as to the time and manner of service;" which motion the justice overruled. The

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justice's transcript recites that the defendant then filed separate demurrers to each paragraph of the complaint, which were overruled, and the defendant excepted.

Thereupon the defendant filed an answer of three paragraphs. The first paragraph sets out the record of the board of trustees, showing the employment of the plaintiff and her discharge by the board of school trustees. It re-states much of the matter alleged in the second paragraph of the complaint. It alleges that on April 26th, 1870, "on account of the continued misconduct of the plaintiff, her incompetency and insubordination, and conduct detrimental to the interest of the public schools," the board of school trustees discharged her, and ordered the clerk of the board to notify her that her connection with the school would cease on April 30th, 1870, which notice was duly served on her. This, we suppose, was the notice alleged in the complaint to have been received by the plaintiff, April 29th, 1870; that since that time the plaintiff has performed no services for the defendant as teacher or otherwise.

That on May 7th, 1870, the plaintiff still pretending to be under the employment of the defendant, John W. Fullen, Superintendent of said public school, preferred charges in writing against the plaintiff before the board of trustees, and the plaintiff was duly notified of the time and place of the hearing thereof. This is the notice set out in the complaint, containing a copy of the charges; that at the time and place specified for the hearing of the charges, the board of trustees met, the plaintiff not appearing, swore and examined witnesses; and upon hearing the evidence, the board adjudged the charges to be sustained, and discharged the plaintiff as a teacher in the school, and notified her accordingly. The board also ordered the clerk to tender to the plaintiff the amount due her up to May 12th, 1870. The tender, amounting to \$20.25, was accordingly made, but refused, and the money was brought into court for her. This paragraph of the answer was long, including the record of the

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proceedings of the board, but we have stated the substance, except what already appeared by the complaint.

The second paragraph of the answer was pleaded in abatement of the action, and avers that the writ should abate, the matter involved in the suit having relation to the affairs of the defendant as a school corporation, because the summons was not served in the proper manner, nor upon the proper persons, nor yet a sufficient length of time, as required by the school law.

The third paragraph was the general denial.

The justice sustained a demurrer to the first and second paragraphs of the defendant's answer, and on trial rendered judgment for the plaintiff for the sum of \$67.50.

On appeal of the cause to the circuit court, the defendant filed demurrers to each paragraph of the complaint, but they were overruled, and exception was taken.

The plaintiff then demurred to the first and second paragraphs of the answer, and the demurrer was sustained, and the defendant again excepted.

The court thereupon rendered judgment for the plaintiff, for the sum of \$72.50, to which no objection was made or exception taken.

The errors assigned are sufficient to embrace all the grounds relied upon for a reversal.

We are of opinion that each paragraph of the complaint was good. No objection has been pointed out to the first, and none to the second, except a point which will be noticed in considering the first paragraph of the answer.

The first paragraph of the answer relies upon the record of the proceedings of the board of trustees. It does not allege, as a matter of fact, that the plaintiff was incompetent as a teacher, nor that she was guilty of any improper conduct, nor that she had failed or refused to comply with the rules established by the trustees. In short, it does not allege that she had in any way violated the contract on her part. It does not allege, as matter of fact, on which issue could have been taken, any reason for her dismissal as such

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teacher. The gist of the defence is, that she was dismissed by the trustees on the charges made against her, they having, after giving her due notice, heard the evidence in support of the charges, and having adjudged them sustained. The trustees became her triers, and the defendant relies upon the result of that trial as the justification of her removal.

This leads to the inquiry whether any authority is conferred upon the board of school trustees of an incorporated town or city, to hear and determine charges against teachers, and to discharge them. The only statutory provision bearing upon this question, so far as we are advised, is to be found in the latter part of sec. 28 of the school law of 1865. 3 Ind. Stat. 449. It provides, that "the said trustee shall not employ any teacher whom a majority of those entitled to vote at school meetings have decided, at any regular school meeting, they do not wish employed; and at any time after the commencement of any school, if a majority of such voters petition such trustee that they wish the teacher thereof dismissed, such trustee shall dismiss such teacher, but only upon due notice, and upon good cause shown," etc.

It is contended by counsel for appellee, that the provision above quoted is applicable to incorporated towns and cities, and, therefore, that the school trustees therein cannot dismiss a teacher, except upon the petition of a majority of the voters. On the other hand, the counsel for the appellant claims, as we understand his brief, that the provision has no application to incorporated towns and cities. We are of opinion that the latter is the correct view of this question. The statute, in using the words "such voters," refers to persons entitled to vote at school meetings. School meetings are not held in towns and cities. It will be seen by an examination of the act of 1865, that when the enumeration of the children was taken under that act, the parents, guardians, etc., were to be enquired of as to the school to which they were desirous of being attached; and upon the selections having been made, the persons selecting any given

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school were to be regarded as constituting the school district of the school selected. But such inquiries were not to be made in cities and incorporated towns. The persons listed, as parents, etc., in any town or city, constituted but a single district. Sec. 14. It seems that while outside of towns and cities the inhabitants had the privilege of selecting the school to which they would become attached, and thus, the district of which they would form a part, no such privilege was conferred upon the inhabitants of incorporated towns and cities. In cities and in many towns, while they each constitute but one district, many school-houses are necessary. These are usually established in different parts of the cities and towns for the convenience of the inhabitants.

There is no provision in the law, that we are aware of, authorizing parents or guardians to determine to which one of the schools they will send their children in towns and cities. These matters are managed, we believe, by the trustees exclusively, in towns and cities, who, doubtless, to some extent, consult the wishes of the inhabitants, having in view the grade of school which it is proper that any given pupil should attend, the convenience of parents, and the surrounding circumstances. "Voters," as defined by secs. 14, 15, and 16 of the act, are such persons as have become a part of a given school district. Then it is provided by sec. 25, that "the voters as defined by section 14, 15, and 16 of this act, shall meet annually on the first Saturday in October, and elect one of their number director of such school, who shall, before entering upon duty, take an oath faithfully to discharge the same." The duties of the director are defined principally by secs. 29, 30, and 31 of the act. Amongst other things, he may exclude any refractory pupil from school. By sec. 32, an appeal lies from his decision in excluding a pupil, to the township trustee. By sec. 26 it is provided, that "the voters at school meetings, as provided in sections 14, 15, and 16 of this act, may hold other school meetings at any time, upon a call of the director, or any five of such

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voters." Such school meetings have power, among other things, to designate their teacher.

Keeping in view these various provisions, and others contained in the act not necessary to be particularly noticed, it is evident that it was not the intention of the legislature that the provision quoted from sec. 28 should have any application to incorporated towns and cities, in which there are no "voters" in the sense in which the word is used in the statute, and in which the machinery of school meetings and school directors is unprovided for and unknown. Outside of towns and cities, where school meetings are provided for, and where such meetings have power to designate their teacher, it is quite reasonable that the voters at such meetings should have a voice in the question of the dismissal of such teachers. It would be impracticable to carry out the provision in incorporated towns and cities, where there are many schools, and where the patrons of each would know little or nothing of the character or qualifications of the teachers in the others. The patrons of any given school, in an incorporated town or city, do not, as outside thereof, constitute a school district. The entire town or city constitutes the district, however many different schools may be established. If the provision in question were to be held applicable to towns and cities, a majority of all the voters in the town or city would be necessary to meet the requirements of the provision. This, in very many cases, would be utterly impracticable. Besides this, it would be an unjustifiable interference on the part of the patrons of one school to petition for the dismissal of a teacher in a school which they do not patronize. We are quite well satisfied that the provision in question has no application to cities and incorporated towns; and this view of the law is in harmony with that taken and acted upon by the department of public instruction.

But one portion of the provision is no more applicable to cities and towns than another. If the provision on the subject of the petition of the voters is not applicable to cities

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and towns, neither is that authorizing the trustees to dismiss teachers, for they are both inseparably blended together.

It results that there is no statutory provision requiring or authorizing trustees in cities and incorporated towns to dismiss teachers at all.

By section 164 of the act, it is provided, that appeals from the decisions of the trustees shall lie to the school examiners, "and their decisions of all local questions relating to the legality of school meetings, establishment of schools, and the location, building, repair, or removal of school-houses, or transfers of persons for school purposes, and designation and dismissal of teachers, shall be final."

This section, so far as it provides for an appeal from the action of the trustees to the examiners, in dismissing teachers, cannot be construed to apply to incorporated towns and cities, because, as we have seen, in such towns and cities the trustees are not empowered by the statute to dismiss teachers at all. The right of appeal here provided for was intended to be commensurate, and only commensurate so far as it relates to the dismissal of teachers, with the power of dismissal vested by the act in the trustees.

The correctness of the action of the trustees, then, in the dismissal of the appellee, must be tested by the general principles of the law applicable to the case. It does not follow that, because the school trustees in incorporated towns and cities are not authorized by statute to dismiss teachers, they have no power or authority to do so, when there is any valid reason for such dismissal. The relation of teacher and pupil is one of the utmost importance to the well-being of that generation which is soon to take the place of the present in the active duties of life; and too much care and discrimination cannot well be taken in the selection of those who, as teachers in our common schools, are, in a great degree, to mould the moral and intellectual qualities of those whose rudimentary culture is placed under their charge. A teacher, doubtless, like a lawyer, surgeon, or

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physician, when he undertakes an employment, impliedly agrees that he will bestow upon the service a reasonable degree of learning, skill, and care. When he accepts an employment as teacher in any given school, he agrees, by implication, that he has the learning necessary to enable him to teach the branches that are to be taught therein, as well as that he has the capacity, in a reasonable degree, of imparting that learning to others. He agrees, also, that he will exercise a reasonable degree of care and diligence in the advancement of his pupils in their studies, in preserving harmony, order, and discipline in the school; and that he will himself conform, as near as may be, to such reasonable rules and regulations as may be established by competent authority for the government of the school. He also agrees, as we think, by a necessary implication, that while he continues in such employment, his moral conduct shall be in all respects exemplary and beyond just reproach.

Now, if a teacher, although he has been employed for a definite length of time, proves to be incompetent, and unable to teach the branches of instruction he has been employed to teach, either from a lack of learning, or from an utter want of capacity to impart his learning to others; or if, in any other respect, he fails to perform the obligations resting upon him as such teacher, whether arising from the express terms of his contract or by necessary implication, he has broken the agreement on his part, and the trustees are clearly authorized to dismiss him from such employment.

On the other hand, where a teacher has been employed for a definite length of time, and has in all respects fulfilled the contract on his part, and discharged all the obligations resting upon him as such teacher, he cannot be legally discharged from the employment, without his consent, until the expiration of the term of his employment.

The answer we have been considering is bad, inasmuch as it does not aver that the appellee was guilty of any breach of the contract on her part. It relies upon the record of the

action of the trustees in dismissing her, and not upon the existence of such facts as authorized the dismissal. Had these trustees been authorized by the statute to dismiss teachers, an appeal lying from their action to the school examiner, the case would have stood upon quite different ground. The teacher in such case would be regarded as having contracted with reference to the law, and the action of the trustees, unappealed from, would seem to be binding upon him. But this case, as we have seen, must stand upon common law ground, and the defence cannot succeed, in the absence of any allegations, as averments of facts, showing that there was sufficient cause for the dismissal. The demurrer to the first paragraph of the answer was correctly sustained.

We come to the second paragraph. We have seen that the process in the cause was served by reading to the Mayor, Marshall, and Clerk of the board of school trustees, and only three days before the return day thereof. It is contended by the appellant, that it should have been served by copy, left with the school trustees ten days before the return day thereof, in accordance with section 144 of the school act. We need not decide this question, as the answer must be held bad, admitting the correctness of the appellant's position in this respect. When the cause was appealed to the circuit court, the first step that seems to have been taken therein, after some continuances perhaps, was the filing of demurrers to the complaint. This amounted to a full appearance to the action. *Kegg v. Welden*, 10 Ind. 550; *Knight v. Low*, 15 Ind. 374. There was no motion in the circuit court to quash or set aside the summons, or the service thereof, but a full appearance was entered as above stated. Such appearance was a waiver of all defects in the process or the service thereof. 1 Davis Ind. Dig. 38, and 2 Davis Ind. Dig. 17, title Appearance. Conceding that a defect in the service of process is a proper matter for an answer in abatement, a proposition that we do not decide, still it cannot be made available after there has been a full appearance to

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the action as in this case. The demurrer to this paragraph was correctly sustained.

Error is assigned upon the rendition of judgment for the plaintiff below, there being a paragraph of answer, the general denial, undisposed of. No objection was made to this, and it does not seem to be relied upon as ground of reversal. As no objection was made in this respect, we presume it was acquiesced in, although the paragraph was not specially withdrawn.

There is no error in the record, and the judgment must be affirmed.

The judgment below is affirmed, with costs.

J. M. Butler and *W. F. Brush*, for appellant.

T. Patterson, for appellee.

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LANDLORD AND TENANT.—*Lease.—Privilege of Renewing.—Election.—Holding Over.—Relief in Equity.*—Where real estate was leased for a term of five years, the rent to be paid semi-annually, and the lease contained a clause providing that the lessee was "to have the privilege of renting said premises for another term of five years," at the same rent and payable in the same manner, and after the five years expired the lessee continued in possession for eighteen months, paying rent as before, but no demand was made by the lessee for a renewal of the lease, and three months before the expiration of the second year after the expiration of the five years, possession was demanded by the lessor and notice to quit at the end of the current year served upon the lessee; *Held*, that continuing to hold possession after the expiration of five years and paying rent by the lessee according to the terms of the lease, and the acceptance of the rent by the lessor, did not amount to the creation of a new term for five years.

Held, also, that under the covenant or agreement to renew the lease, the lessee must have elected to renew the lease and must have given notice thereof at or before the expiration of the first term; and it was too late to do so after the expiration of eighteen months and after notice to quit.

Held, also, that a failure to give such notice at the proper time was not a failure

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which could be relieved against in a court of equity, except when the failure had resulted from unavoidable accident, fraud, surprise, or ignorance not wilful, and upon compensation being made.

WILFUL IGNORANCE.—*Relief.*—Ignorance is considered wilful when a person neglects the means of information which ordinary prudence would suggest; and ignorance of a man's own rights conferred by an instrument actually in his possession or power, when the other party is innocent of concealment, or of any conduct contributing to keep him ignorant of its contents, will not excuse the performance of the conditions imposed on the person claiming under the instrument.

APPEAL from the Switzerland Circuit Court.

DOWNEY, J.—This was an action brought by the appellants against the appellee, to recover the possession of certain real estate, of which it is alleged the plaintiffs are the owners in fee simple, and entitled to possession, and of which, as is alleged, the defendants hold possession without right, and to recover fifty dollars for damages in being kept out of possession of the same.

After a demurrer to the complaint, which was overruled, the defendant answered,

1st. A general denial; and

2d. That on the 15th day of April, 1864, Charles Thiebaud, then in life, but since deceased, from whom the plaintiffs derive their title, entered into a written agreement with the defendant, a copy of which is filed with the answer; that on the first day of May, 1864, the defendant, in pursuance of said agreement, entered into possession of said premises, and has at all times fully complied with the terms of said agreement; and it now holds and occupies said premises under and by virtue of said agreement, and is entitled by the terms of said agreement to hold said premises until the 1st day of May, 1874.

The agreement is dated the 15th day of April, 1864, and by it the said Charles Thiebaud rented to the bank the real estate in question for the term of five years from the 1st day of May, 1864, at the rate of seventy dollars per year, payable semi-annually; and in the lease or agreement there is the following clause or stipulation: "It is agreed between

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said parties that said bank is to have the privilege of renting said premises for another term of five years, at the same rate of rent as specified for the first term of five years, payable in the same manner as above set forth."

3d. A third paragraph of the answer, which assumed the form of a cross complaint after the same was amended, alleges the making of the said agreement or lease by the ancestor of the plaintiffs, a copy of which is filed with the cross complaint, the taking of possession of the premises by the bank with the full knowledge and consent of Thiebaud, deceased, the holding of the same, and the payment of the rent stipulated for until the expiration of the said first term of five years, on the 1st day of May, 1869; and that on and after said last named date, the defendant, in accordance with said contract and with the full knowledge and consent of said Charles Thiebaud, remained in full and peaceable possession and occupancy of said premises, paying rent therefor, at the rate of seventy dollars per year, every six months, which said deceased received and accepted from defendant, and for which he gave his receipts in writing, copies of which are filed, until April, 1871. On said last named day, said Charles Thiebaud departed this life, after executing his last will and testament, by which two of the plaintiffs, who are named, were appointed his executors, who qualified as such in May, 1871; that on the 11th day of May, 1871, the defendant tendered and offered to pay to one of the executors the full amount of rent then due for said premises, according to the terms of said contract, but he refused to accept the same. It is also alleged that the bank now brings into court the sum of thirty-five dollars, the full amount of rent due for said premises up to that date, by the terms of the contract. The plaintiff in said cross complaint avers that it was, as against said deceased, and now is, as against the plaintiffs as his heirs at law, entitled to a renewal of said lease or renting for the term of five years from the 1st day of May, 1869, and ending on the 1st day of May, 1874, on the terms and conditions mentioned in the said contract, and

demands judgment that the plaintiffs, as such heirs, be compelled to execute to the said bank a valid lease for the said premises on the said terms for said term of time, and that it be allowed to continue to occupy said premises up to the 1st day of May, 1874, and for all proper relief.

The plaintiffs demurred separately to the second and third paragraphs of the answer. The demurrer to the second was sustained, and that to the third seems not to have been decided, but a reply in denial of the third was filed, making it probable that the demurrer was passed upon but no entry thereof made. In the reply the plaintiffs allege, that the said deceased did rent said real estate to the defendant, as set out in the answer, and that the five years expired on the 1st day of May, 1869; that no demand was made for the renewal of said lease, nor for a further term, at or before the expiration of said original term, by the defendant, of the deceased or his heirs; and that by mistake the decedent did not know his lease had expired; that the same was laid away five years before its expiration, and defendant did not notify decedent, who was then living, of the expiration of said lease nor of any desire to hold another term; and the lessor received the rent for said eighteen months from the lessee in ignorance of the expiration of said term, and not with any intent to renew it or create a new term under or like the terms of said lease. Defendant well knew said facts at the time of paying said rent, after the expiration of the term of said lease, to wit, the term of five years; and the lessor, immediately upon discovery of said mistake as to the time, and that said lease had expired, and rent had been paid after the expiration thereof, notified the defendant of said mistake and demanded possession of said premises, which was refused, and thereupon served upon the defendant a notice in writing to quit said premises and surrender possession on the 1st day of May, 1871, which was the end of the current year, which notice was served on the 11th day of January, 1871, more than three months before the expiration of the current year; wherefore, etc.

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To this reply a demurrer was filed by the defendant, on the ground that it did not state facts sufficient, etc., which was sustained by the court. The plaintiff failing further to reply, judgment was rendered by the court for the defendant.

Several errors are assigned, but they present only one question, and that is as to the rights of the parties under that part of the lease or contract which we have above quoted.

The appellants contend that the holding over and payment of rent for eighteen months after the expiration of the first term of five years do not amount to the creation of a new or further term for five years from the date of the expiration of the first term, but that, on the contrary, these facts only created a tenancy from year to year, which might be and was terminated by the notice to quit; and that, consequently, the appellants were entitled to the possession of the premises and to maintain their action therefor.

The appellee insists, in the first place, that the instrument should be construed as a present demise of the premises, not only for the first five years, but also as a present demise for the second term of five years, at the option of the lessee; and that the remaining in possession with the knowledge and consent of the lessor for eighteen months after the expiration of the first term, paying rent according to the terms of the contract, and the giving of the receipts therefor were, when considered in connection with the language of the instrument, sufficient notice to the lessor of an election to accept the lease for the second term of five years; and in this connection it is insisted that the court erred in sustaining the demurrer to the second paragraph of the answer. But it may as well be stated in this connection as at any other place in this opinion, that there is no cross error assigned, and we can not therefore decide the question as to the sufficiency or insufficiency of the second paragraph of the answer. Notwithstanding this, however, it may become necessary for us to consider the views of the

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contract thus presented, in disposing of the other points in the case.

Upon the facts alleged in the third paragraph of the answer, it is contended by the appellee, that if the instrument is not a present leasing, it is an agreement for a renewal of the lease, which a court will decree to be specifically performed; and that it is a covenant running with the land, and therefore binding on the heirs as well as on the lessor himself. It is further insisted that there is no mistake alleged in the reply which would entitle the lessor or his heirs to any relief; that he had the lease in his possession, and was bound to know its terms; that no fraud is charged, nor any act on the part of the bank inconsistent with its legal rights under the contract.

We will inquire, then, whether the covenant and the continuing to hold possession and to pay rent according to the terms of the original lease amounted to the creation of a new term.

The part of the instrument in question is not in itself a lease for the second term of five years, nor is the whole instrument a lease for ten years with the privilege to the tenant to quit at the end of the first term of five years. It is a lease for five years, containing a covenant on the part of the lessor that the lessee may have "the privilege of renting the premises for another term," etc. The holding over and paying rent, according to the provisions of the lease relating to the first term, are relied upon by the appellee as showing an election on its part to hold for the new term of five years; and the acceptance of the rent is claimed as showing an acquiescence of the lessor and notice to him of such election. The case of *Kramer v. Cook*, 7 Gray, 550, was a case where the lessor sued the lessee for rent. The lease was for a term of three years, at seven hundred dollars per year, and, at the election of the lessee, for the further term of two years next after said term of three years, at a rent of seven hundred and fifty dollars per year. To prove the election of the defendant to hold under the lease for the

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additional term of two years, the plaintiff produced evidence of the payment, after the expiration of three years, of two quarters' rent, at the advanced rate stipulated for in the lease in case the defendant elected to hold for the additional term, the declarations of the defendant that he was so holding, and a written notice by the defendant, after the expiration of the first term, to the plaintiff to repair the premises, and that he would hold the plaintiff responsible for the resulting damages if he did not repair. In disposing of the case, the learned judge who delivered the opinion of the court said: "No formal election or notice was necessary to the continuance of the lease for the additional term of two years. The continuing to occupy the premises, and the payment of the rent at the increased rate stipulated for in case of continuance, were the best possible evidence of the election of the defendant to avail himself of the further term. They were a declaration and an act—the expression of the wish and its execution. If before the payment of the rent for the first quarter of the new term any doubt could exist under what tenure the defendant was holding, the payment of the rent at the increased rate removed the doubt. If it was necessary to prove that the election of the defendant was made at the time of the expiration of the three years, the evidence was ample for the purpose. He continued to occupy after the expiration of the three years. He paid the increased rent stipulated for from the time the three years expired. There is nothing in the case to indicate that at any time he claimed to occupy on any other terms. The provision in the lease is not a mere covenant of the plaintiff for renewal; no formal renewal was contemplated by the parties. The agreement itself is, as to the additional term, a lease *de futuro*, requiring only the lapse of the preceding term and the election of the defendant to become a lease *in presenti*. All that is necessary to its validity is the fact of election.

"Even if notice of the lessee's intent to continue might be insisted upon by the lessor, he clearly might waive it; and he clearly did waive it by the acceptance of the increased

rent on the first days of April and July—an increase which could be predicated only upon such election by the lessee. Indeed, after the payment of the rent of July 1st and the receipt given therefor, and in the absence of evidence to control their effect, the question of the defendant's election to continue and of the plaintiff's assent thereto would not seem to be an open one."

There are some circumstances of difference between the language of the covenant in the Massachusetts case and that in the case under consideration. In the former case the new term was at an increased rate of rent, and the payments made were made at the increased rate.

In *Renoud v. Daskam*, 34 Conn. 512, the lease was for a term of five years, with a covenant that the lessor would, if thereto desired by the lessee, make and execute to the lessee a lease of the premises for the further term of five years upon the same terms. It was held, that to entitle the lessee to a renewal of the lease, it was necessary for him to declare his election before the expiration of the original term of five years. In that case the term of five years expired on the last day of March. The lessee remained in possession, and on the 2d day of April the lessor demanded possession and gave him notice to quit, upon which he stated his election to take a renewal of the lease and demanded the same. He sued for specific performance of the covenant, and it was held, that he was not entitled to any relief, because he had not given notice of his election to hold for the second term in proper time. This last case is distinguishable from the case under consideration in this, that there there was no act on the part of the lessor indicating an assent to the extension of the renting for the new term; while here there were three payments of rent which were accepted and receipted for by the lessor, and a holding over for eighteen months. The authorities seem to require, where the lessee is entitled to a renewal of the lease, that he should give notice promptly at or before the expiration of the first term or according to the agreement, unless other circumstances

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of a controlling nature exist in the case, amounting to an excuse. In addition to the case of *Renoud v. Daskam*, *supra*, the following cases on this point may be noted: *Griffin v. Griffin*, 1 Sch. & L. 352; *Rubery v. Jervoise*, 1 T. R. 229; *Bayly v. The Corporation of Leominster*, 1 Ves. 475; *Maxwell v. Ward*, 13 Price, 674; S. C. 11 Price, 3; *The City of London v. Mitford*, 14 Ves. 41; *M'Alpine v. Swift*, 1 Ball & B. 285; *Baynham v. Guy's Hospital*, 3 Ves. 295; and *Eaton, v. Lyon*, 3 Ves. 690.

There is in this case no circumstance inconsistent with the position that the tenancy became, after the expiration of the first term, a tenancy from year to year. Chancellor Kent says: "If a tenant holds over by consent given, either expressly or constructively, after the determination of a lease for years, it is held to be evidence of a new contract, without any definite period, and is construed to be a tenancy from year to year." It is expressly provided by statute in this State, that "all general tenancies, in which the premises are occupied by the consent, either express or constructive, of the landlord, shall be deemed tenancies from year to year." A tenant for years, or from year to year, holding over will be presumed to hold under all the covenants of the former lease which are applicable to the new relation or tenancy. In support of these propositions we refer to *Finney v. The City of St. Louis*, 39 Mo. 177; *De Young v. Buchanan*, 10 Gill & J. 149; *Vrooman v. McKaig*, 4 Md. 450; *Ames v. Schuesler*, 14 Ala. 600; *Bradley v. Covell*, 4 Cow. 349; *Conway v. Starkweather*, 1 Denio, 113; *Jackson v. Salmon*, 4 Wend. 327; *Hyatt v. Griffiths*, 33 Eng. L. & Eq. 75. In *Prickett v. Ritter*, 16 Ill. 96, the rule is stated to be, that where a party enters upon premises under a lease for a year or years, and holds over, it will be construed as an implied agreement for a year, and from year to year. When a lease is for any period less than a year, the holding will be construed as being for another term of the same length of time; and in all cases as upon the same terms, as to the amount of rent

and times of payment, unless there be some act of one or both of the parties to rebut such implication. The case of *Bright v. McOuat*, 40 Ind. 521, which is cited by counsel for the appellee as authority, agrees with the doctrine as above stated. There the term was for less than a year, and it was held, that by holding over the tenant was to be understood as electing to hold for another similar term.

These cases sufficiently show that the holding over by the lessee in this case, and the payment of three half yearly instalments of rent, are entirely consistent with a tenancy from year to year, after the expiration of the five years, and do not amount to any more than the creation of such a tenancy. This tenancy might legally be determined by at least three months notice to quit, expiring at the close of a current year. 2 G. & H. 359, sec. 3.

Do the facts set up in the third paragraph of the answer show a case for specific performance? We are of the opinion that they do not. A court of equity may, in a proper case, decree the specific performance of a covenant to renew a lease, and the cases involving the construction of such covenants have generally been in chancery, as a reference to the cases cited will show.

It is true, that in equity, time is not generally regarded as material, unless the parties have made it so by their contract; and this doctrine is more frequently applied to cases for specific performance than to any other class of cases. But in the cases involving the specific performance of covenants to renew, it is laid down, that to give a right of action for specific performance, the lessee must have given notice of his election or determination to take the new term at or before the expiration of the time limited. We think that the proper construction of the covenant in this case is, that the election or determination must have been made and notice thereof given, at or before the expiration of the first term, and that therefore it was too late to do so after the expiration of eighteen months, and after notice to quit. In *Falley v. Giles*, 29 Ind. 114, a lease was made for two

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years, with the privilege to the lessee to hold the premises upon the same terms for the additional term of one, two, or three years, at the election of the lessee. The questions in the case were, whether the lessee having, at the end of the original term of two years, elected to hold for one year longer, could again elect to hold still longer; and, second, was it necessary for the lessee, in order to prolong his term more than one year beyond the original period, to give notice to the lessor of his election to do so, otherwise than by remaining in possession? It was held in the first place, that there could be but one election, and in the second place, that to enable the tenant to hold more than one year after the expiration of the first term, he must give notice to the lessor, and that merely remaining in possession did not amount to such election and notice. The failure of the lessee to elect to renew the lease for the second term and to give notice to the landlord at the proper time, is not a failure which can be relieved against in a court of equity, except, as it seems, when the failure has resulted from unavoidable accident, fraud, surprise, or ignorance not wilful, and upon compensation being made. See the cases above cited; also Platt Cov. 256, *et seq.* As to what amounts to wilful ignorance, we find this statement of the law in a work of the last named author, and it is sustained by the authorities cited by the author, some of which we have examined, and have cited in this opinion:

“Ignorance is considered wilful, where a person neglects the means of information which ordinary prudence would suggest; and it is clear that ignorance of a man’s own rights, conferred by an instrument actually in his possession or power, where the other party is consequently innocent of concealment, or of any conduct contributing to keep him ignorant of its contents, cannot excuse the performance of any conditions imposed on the person claiming under the instrument.” 1 Platt Leases, 759.

There is nothing in the case to show such circumstances of excuse on the part of the lessee in this case as would

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justify the interposition of a court of chancery. The doctrine that courts of equity do not regard time as of the essence of the contract, unless made so by the parties, does not meet the difficulty in this case. Had the lessee given notice of its election to rent for the second term, in proper time, it would then have had a perfect right of action, which might have been enforced in a suit for specific performance. But not having done this, and having allowed the tenancy to become converted into a tenancy from year to year, we are of the opinion that the cross complaint can not be sustained. We think the court should have sustained the demurrer to the third paragraph of the answer.

The judgment is reversed with costs, and the cause remanded, with instructions to sustain the demurrer to the third paragraph of the answer, and for further proceedings in accordance with this opinion.

H. W. Harrington, C. A. Korbly, and Adkinson & Livings,
for appellants.

W. R. Johnston, for appellee.

SNIDEMAN v. RINKER.

JURISDICTION.—*Common Pleas Court.*—*Specific Performance.*—Where in an action in the court of common pleas for specific performance of a contract for the sale and conveyance of real estate, the court overruled a demurrer to the complaint for want of jurisdiction;

Held, that as it did not appear that the title to the property would be involved, and as the proper course, if such had been the case, would perhaps have been a motion to transfer the cause to the Circuit Court, there was no error.

SAME.—*Trial and Judgment.*—An answer of general denial was filed, not sworn to, and the court tried the case and rendered judgment for specific performance.

Held, that it could not be said that the court erred in entertaining jurisdiction.

APPEAL from the Henry Common Pleas.

DOWNEY, J.—The only question in this case is, whether

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the common pleas had jurisdiction in a suit for the specific performance of a contract for the sale and conveyance of real estate. The question arises upon the overruling of a demurrer to the complaint for want of jurisdiction in the court. Appellant refers to 2 G. & H. 6, sec. 5; also, *id.* 22, sec. 11; *Clark v. Trowinger*, 8 Ind. 334; *Dixon v. Hill*, 8 Ind. 147; *Livesey v. Livesey*, 30 Ind. 398; and *Mason v. Weston*, 29 Ind. 561. The appellee relies on *Wolcott v. Wigton*, 7 Ind. 44; *Holliday v. Spencer*, 7 Ind. 632; *Carpenter v. Vanscoten*, 20 Ind. 50; and *Macy v. Allee*, 18 Ind. 126.

The question is not clear of doubt and difficulty. But suppose, when the issues are formed, the only question in dispute should be, whether the purchase-money had been paid or not; would the title to real estate be then in issue? We think not. Upon a demurrer to the complaint, it did not necessarily appear that the title would be in issue. If it did, perhaps the proper course would have been a motion to transfer the cause to the circuit court. 2 G. & H. 22, sec. 11. The answer was the general denial, not verified by the oath of the party. The court entertained jurisdiction and decreed specific performance. We can not say that there was any error.

The judgment is affirmed, with costs.

J. Brown and *R. L. Polk*, for appellant.

D. W. Chambers and *E. Saint*, for appellee.



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PRACTICE.—*Impanelling of Special Jury.*—*Statute.*—The act of March 7th, 1873 (Acts 1873, Reg. Ses. p. 103), empowering the circuit court, whenever its business requires it, to order the impanelling of a special jury for the trial of any cause, does not authorize the court to impanel such jury before the day fixed for the trial of causes, to which day the regular panel has been

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summoned. It was intended to authorize a special jury when the regular panel is engaged or after it has been discharged.

SAME.—*Jury Trial.*—Where a person indicted for grand larceny expressed himself as ready for trial on the fifth day of the term, none of the petit jury being present, not having been summoned to attend until the seventh day, and the court ordered a special jury to be impanelled, over the objection of the defendant, and proceeded to try him;

Held, that the trial was irregular, and the defendant was entitled to a new trial.

APPEAL from the Grant Circuit Court.

OSBORN, C. J.—The appellant was indicted for grand larceny, tried by a jury, convicted, and, over a motion for a new trial, sentenced, on the fifth day of the April term, being the 2d day of May, 1873. Proper exceptions were taken by him to the action of the court.

By an act of the General Assembly, approved March 7th, 1873, and which by its terms was in force from its passage, it is provided, that the circuit judges should have the power, and it was made their duty, by proper order, to arrange and regulate the order of business in their respective circuits, and in such order to provide,

1. For the making up of issues and transaction of probate business.
2. For the trial of criminal business.
3. For the trial of civil business.

It provided that the petit jury should be summoned to appear on the first day designated for the trials of criminal business and not before; that after the beginning of the trial term, the court should proceed to try the cases in their regular order, which trials should not be delayed or interrupted by the making up of issues; that the judge should, as far as practicable, so arrange the cases to be tried by the court, that they might be tried after the discharge of the jury; and that the jury should be immediately discharged when the issues requiring it should be disposed of. The act conferred upon the court power, when its business should require it, to order the impanelling of a special jury for the trial of any cause. Acts of Reg. Ses. 1873, p. 103.

The regular panel of jurors was summoned to appear on Monday, the 7th day of the term, and we will presume, in the absence of any thing to the contrary, that that was the first day designated in the order of the judge for the trial of criminal business. On Friday, the fifth day of the term, and when none of the regular panel of jurors were present, the appellant expressed himself as ready for trial by the court. The court, of its own motion, ordered the sheriff to call a jury of the by-standers to try the indictment, which order was complied with. The appellant objected to being tried by that jury and demanded to be tried by the regular panel. His objection was overruled, and he was compelled to proceed with his trial then and before that jury.

The action of the court is attempted to be maintained under the provision authorizing the court to order the impanelling of a special jury when its business requires it. The business of the court could not require the trial of an issue of fact before the day designated for it in the judge's order, or before the day on which the jury was to be summoned to appear. The construction claimed would leave it to the mere uncontrolled discretion of the judge to decide that the business of the court required the trial of a cause by a jury before the day to which witnesses were summoned. On the day designated, the trial term commenced. After that the business of the court might require a special jury, but not before. The regular panel might be engaged in the trial of a cause, or discharged.

We think it more in accordance with the spirit of our laws to put such a construction upon the one in question as not unnecessarily to deprive a party of the benefit of the regular panel of jurors. *Rogers v. The State*, 33 Ind. 543.

Other questions are discussed by counsel, but as the one decided disposes of the whole case, it is unnecessary to consider them. Indeed, it can hardly be said that they remain as questions in the record after the main one is decided; and, besides, we do not think the alleged errors will occur again on another trial of the cause.

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The judgment of the said Grant Circuit Court is reversed, and the warden of the northern state prison is directed to cause the appellant to be returned to the jail of Grant county and delivered over to the jailor of that county.

A. Steele, R. T. St. John, and G. T. B. Carr, for appellant.

J. C. Denny, Attorney General, for the State.

CLINE v. GUTHRIE.

PROMISSORY NOTE.—*Fraud in Obtaining Signature.*—*Want of Delivery.*—*Innocent Holder.*—*Estoppel.*—Where the maker of a promissory note payable at a bank in this State was induced by the fraud and circumvention of the payee to sign his name to such note, when he honestly supposed and believed that he was writing his name on a blank piece of paper, to enable the payee to see how his name was spelled or written, and the maker did not, after he discovered that he had so signed his name to the note, voluntarily deliver it to the payee, but it was taken possession of wrongfully and forcibly by the payee, and by him carried away against the consent of the maker and negotiated;

Held, that the maker was no more bound by his signature than if it were a total forgery, although the person to whom it was negotiated was a purchaser and holder in good faith and for a valuable consideration before maturity.

Held, also, that admitting that the maker signed his name to the note, with full knowledge of its character, it was nevertheless invalid and void, even in the hands of an innocent purchaser for value, for the want of delivery; nor was the maker liable on the ground that when one of two innocent persons must suffer by the act of a third, he who has enabled such third person to occasion the loss must sustain it.

APPEAL from the Scott Circuit Court.

BUSKIRK, J.—This action was brought by the appellee upon a promissory note of the following tenor, the italicised words being the written part of the note:

“Lexington, Scott Co., Ind., Oct. 22d, 1869.

“Nine months after date I promise to pay Miles & Spaulding, or bearer, two hundred and eighty-seven & 50-100 dollars,

| | |
|------|-----|
| 42 | 227 |
| 181 | 7 |
| 42 | 227 |
| 165 | 232 |
| 42 | 227 |
| 1167 | 542 |

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payable at the First National Bank of Madison, for value received, with interest, without relief from valuation or appraisement laws, interest at 10 per cent. per annum after maturity, and attorney's fees if suit be instituted. The drawer waives presentment for payment, protest, and notice of protest and non-payment of this note.

"\$287.50.

Abraham Cline."

Endorsed as follows: "Sold and transferred this day to A. Guthrie, without recourse to us, Nov. 20th, 1869.

"MILES & SPAULDING.

"Per MILES."

The complaint avers that the appellee was the owner and bearer of the note before maturity, and was still the owner, and that it remains unpaid, with interest and attorney's fees; and that reasonable attorney's fees for collection was reasonably worth fifty dollars; and demands judgment for the amount of the note and interest, and for fifty dollars attorney's fees.

There was no demurrer to the complaint, nor motion. The defendant below answered in four paragraphs, as follows:

1. The general denial, not under oath. 2. A special answer, but afterward withdrawn, and is not in the record. 3. A special plea, sworn to. 4. A plea of entire want of consideration, and that the appellee was not an innocent purchaser and *bona fide* holder of the paper.

The appellee filed demurrers to the third and fourth paragraphs of the answer, which were overruled, and the appellee excepted.

The appellee then filed a reply putting the case at issue.

The cause was, by agreement, submitted to a jury of five; and they were requested by the court, on suggestion of appellee's counsel, to answer certain interrogations, in addition to finding a general verdict.

The jury found in their general verdict that there was due the appellee \$363.07; and the special findings were as follows:

1. Did the plaintiff receive the note in the usual course

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of business, without notice of any fraud, or forgery, or want of consideration, or other defence?

Ans. Yes.

2. Did the plaintiff pay a valuable consideration for the note?

Ans. Yes.

3. Is the signature on the note the signature of the defendant, Cline?

Ans. We believe it is.

4. Are there any alterations apparent on the face of the note?

Ans. No.

5. If the signature is the defendant's, has the note been altered since defendant's name was put there?

Ans. We believe not.

The motion for a new trial was for the following reasons, to wit:

1. The verdict of the jury was contrary to law.
2. That it was not sustained by the evidence.
- 3. The assessment of damages was too large.
4. Error in a certain instruction of the court, and in admitting certain evidence; which instruction and evidence are properly set out in the motion.
5. The special findings were contrary to law, and not supported by the evidence.

The appellant has assigned for error the overruling of the motion for a new trial.

The appellee has assigned as a cross error the overruling of the demurrer to the third paragraph of the answer.

The questions presented by the overruling of the demurrer to the third paragraph of the answer, and the overruling of the motion for a new trial, because the verdict was contrary to, and not supported by, the evidence, are identical; and we will consider them together, and to make our decision intelligible, we will set out the third paragraph of the answer and the substance of the testimony.

The third paragraph of the answer reads as follows:

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Third Par. For further answer to said complaint, said defendant says that his signature to the "note" in plaintiff's complaint mentioned, and a copy of which is filed therewith, was obtained and procured by the payees thereof, the said Miles and Spaulding, in the following felonious and fraudulent manner: On or about the date of said note, October 22d, 1869, two persons came to his house in Scott county, Indiana, representing themselves as agents for the sale of a patent, which they called "The Screw Hay-Fork," and solicited him to become their agent for the sale thereof in said county. And defendant says he did consent to take such agency; and thereupon one of them sat down at defendant's table, and proceeded to fill up a printed blank, which they called a letter of agency, whereby they professed to constitute defendant sole agent for the sale of said patent in said county, for which defendant was not to pay any thing, but was to account at an agreed rate for the proceeds of sales after said forks should be sold; and while writing such letter of agency, the writer requested the defendant to write his name on a blank piece of paper, which said writer held in his hand on the table, to enable him, as he said, to see how defendant's name was spelled or written. And defendant says that, without any knowledge or intention on his part of signing any instrument in writing whatever, and believing that he was only signing his name for said purpose, he reached over on said table and signed his name on such blank piece of paper, for the purpose aforesaid, and for no other purpose whatever; that shortly afterward, the defendant discovering that he had signed the note sued on, instead of making his signature for the purpose and with the intention aforesaid, he objected, and demanded of said parties to deliver up to him said note, which they refused to do, and he was unable to compel them to do so; and they immediately left defendant's premises, taking with them the note procured in the false, fraudulent, and felonious manner aforesaid. And said defendant says that he immediately followed them, for the purpose of compelling them to give up said

note, and thereby preventing them from putting the same in circulation or selling it; but they escaped, and he was unable to find them. And he shortly after took counsel of an attorney as to the proper steps he should take in order to save himself from paying said note, and was advised that said note could not be collected; since which time the whereabouts and residence of said Miles and Spaulding are wholly unknown to him, although he immediately after made inquiry, for the purpose of compelling them to surrender up said note; wherefore the defendant says that the note sued on, and in plaintiff's complaint mentioned, is not his act and deed.

This paragraph was duly sworn to.

The substance of the evidence is as follows:

The note and endorsement were put in evidence, under an agreement that the question of the due execution of the note should be submitted to, and determined by, the jury, with the other questions in issue.

Samuel S. Crowe testified: He was an attorney at law of the Scott Circuit Court, and that reasonable attorney's fees in the case on trial would be ten per cent. on the whole amount of principal and interest.

Archie Guthrie, plaintiff, testified: He had lived at Madison, Ind., five years; that he got the note of Miles & Spaulding at the date of the assignment; bought it, with two thousand dollars worth of other like notes, of M. & S., all upon men in Jefferson county, except one in Clark; that he could not state exactly the consideration paid for the note in suit; it was a lumping trade, he paid over two thousand dollars in money; that he thought he took about ten per cent. off the face of the notes purchased; he asked Alexander Monroe about the solvency of Cline, before he bought the note; that he knew of no defence to the note at the time he bought it; that no part of it had been paid nor the attorney fees; that Miles & Spaulding were strangers to him, and he did not now know where they lived.

Abraham Cline, being introduced as a witness, testified as

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follows: "A portion of the signature to that note looks like my handwriting, and a portion does not. The word 'Abraham' looks like my writing, and the word 'Cline' does not. I can't say whether it is my signature or not. I saw that note at the last term of the Scott Common Pleas Court, when it was in suit in that court. I saw it again yesterday, in the grand jury room, and perhaps at Harlan's Hotel, in this town. At Harlan's I told you [Attorney Friedley] it did not resemble mine. I did not sign any note. All I know about that note is this: One morning—the day of the date of the note, I think—as I was going out to my field to work, two men came to my house in a buggy. They met me near my stable, and proposed to sell me a patent hay-fork. I told them I did not want it." [Here the defendant details at considerable length their conversation, in which he told them he had no money to buy it, and they replied that they did not want any money, which they repeated several times, and proposed to make defendant an agent for the sale of said forks, in Scott county.] "I was not to pay any thing unless I made sales. * * I finally told them I would take the agency upon those terms. We went to the house for them to do the writing. * * When we got to the house, I set out a stand table, and Miles sat down on one side, and I was sitting on the other side, two feet or nearly from the table, with my left side to the table. I had on my lap one of my children, which was crying, and I was busy trying to keep it still. As soon as Miles sat down, he took out several papers, and said he would fill a blank letter of agency to authorize me to sell the fork; and before he began to write, he shoved over to me what seemed to me to be, and I think was, a blank piece of paper, he holding to one side of it, and requested me to write my name on it, so that (as he said) he could see how my name was spelled. With my child in my arms I leaned over, and partly turned around, and wrote my name on the blank piece of paper which he held in his hand. I saw nothing but a blank piece of paper. I paid no further particular attention, except I noticed he went to

writing something. After writing a while, their horses in the buggy, which was hitched at the gate, got scared; and thereupon they both jumped up and ran out to their horses. While they were out, I picked up a paper from the table and saw that it was a note that I had signed for two hundred and eighty-seven dollars, instead of the blank piece of paper. I first concluded to stick it in the fire, but on reflection I concluded to wait till they came back, and I laid it down on the table again. In a few minutes, they came in, and I spoke to them and asked them what that meant—that I had not signed any note, and would not stand it, and would not let them have the note. And immediately, before I had time to take it up again, Miles picked it up right from under my nose and put it in a large pocket-book, and put it in his pocket. I then did not know what to do, and we got into a quarrel about it. Miles finally said he would make it all right, and picked up a piece of paper (it was the letter of agency then lying folded up on the table, but I then did not know what it was, not having seen its contents), and wrote something on the back of it; and immediately both of them left, got into their buggy and drove away towards Lexington.” The witness then relates about following them and failing to find them, and concludes his testimony in chief by stating: “I wrote my name on one piece of paper only.”

On cross-examination, the defendant stated the following additional facts: “I never did receive any thing for said note; there was no consideration for it. The paper I signed looked a third larger than that note. I did not agree to pay them any thing, except after I sold the forks. I never agreed to sign any note. If I did sign that note, I did not know it was a note. I thought it was only a blank piece of paper. When I signed it, I saw nothing but the blank paper. When I picked it up from the table, while they were out at their horses, I did not read it all. I do not think those printed lines at the bottom were there. I did not notice them. I think, but cannot say positively, that I then

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saw some printing on the paper ; I mean, I saw the printing after the men went out to their horses, but not before. *

* * I cannot tell exactly what was in it. I only say I did not then see or notice this printed part of this note, if it is the same note. I never gave these men any note. This is the only transaction we ever had. I did tell Daniel Hennessey, a short time after the transaction, I would like to sell him a hay-fork if they sent them on ; and he told me to be careful."

The letter of agency referred to by Mr. Cline was read in evidence, over objection and exception of appellant, and is as follows :

"Whereas Miles & Spaulding are the proprietors of the Screw Hay-Fork, in the State of Indiana:

"Now this indenture witnesseth that an order for twenty-five forks has this day been made by Abraham Cline, at twenty dollars each, and we have made and appointed him our legal agent to sell said fork in all the townships of Scott county, Indiana, and no where else. This agency is to continue in full force for the term of twelve years. The said Miles & Spaulding obligating themselves not to appoint any other agent for said territory.

"The said Miles & Spaulding further agree that they will furnish and fill all orders hereafter drawn by their agent, with reasonable dispatch, and at the express office named in the order, at the price of six dollars, free of freight, to be paid for on delivery. All orders for forks to be drawn on Bass & Hanna, Fort Wayne, Indiana. Orders for pulleys to be drawn on Garrett & Co., Shelby, Ohio.

"Dated Oct. 22d, 1869. MILES & SPAULDING."

And there was endorsed on the back of said writing :

"Received on the within order two hundred and eighty-seven 50-100 dollars in this note ; it is expressly understood that the said Abraham Cline is not to pay for any more forks than he orders."

Jessamin G. W. Traylor testified: He had been clerk of

the circuit court of Scott county, and was acquainted with handwritings; that comparing the signature on the note with an admitted genuine signature of defendant, he thought it was the signature of Cline.

Daniel Hennessey, expert, said: "Comparing the signature of the note with the signature now shown me, I think the signature on the note genuine. The defendant, shortly after the transaction, wanted to sell me a hay-fork; he said he expected to make the money out of them before he would have to pay for them; he said nothing to me about the note."

John S. Swope, expert, testified: "By comparison of this note with this genuine signature, I think they are the same. I see some difference, but not more than is common in genuine signatures. By examining the signature and the body of the note with an eye-glass, I can see some difference in the color of the ink, a shade. I have noticed the same difference in writing out of the same ink-stand."

Reese Morgan, expert, testified: "By comparing this signature with the genuine one now shown me, I think they are the same. I notice some difference, but not more than men usually make in signing their names. Cline told me they had got his name to a paper, and while they had gone out he saw he had signed a note, and they would not give it back to him."

William E. Hammel testified: Cline told him he did not know he had signed a note until the men went out to look at their horses; that at first their putting the writing on the certificate satisfied him, but he got dissatisfied afterward and wanted the note back, but they would not give it up.

Almond D. Hinds testified: Cline told him they had gotten his note for two hundred and eighty-seven dollars, and had gone off and sold it to a bank; that he (Cline) thought he was signing some paper connected with the agency, but that it was a note. He also said there was a contract of agency, and there was where they got the advantage of him.

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Archie Guthrie testified: Cline told him at Harlan's Hotel he did not deny his signature, but the note was different from what he saw. He also swore, on a former trial, if the note was as it now is, he did not so read it.

Abraham Cline, defendant, testified: "I don't think I told Hinds I was signing part of the contract of agency; I don't say that I remember all that was said.

"Guthrie is mistaken about what I said at Harlan's Hotel. I said the signature looked like my signature."

Alexander Monroe: "Guthrie inquired the same day he bought the note if Cline was responsible, and would do to buy a note on."

The substantial facts averred in the third paragraph of the answer, and those proved on the trial are, that the appellant was induced, by the fraud and circumvention of the payees of the note in suit, to sign his name to such note, when he honestly supposed and believed that he was writing his name on a blank piece of paper, to enable the payees to see how his name was spelled or written, and that the appellant did not, after he discovered that he had signed his name to the note, voluntarily deliver the note to the payees, but that the same was wrongfully and forcibly taken possession of by the payees, and by them carried away against the consent, and over the objection, of the appellant.

Do the above facts constitute a valid defence to the note, in the hands of a purchaser and holder in good faith and for value, before the maturity of the note?

It is well settled by authority and on principle, that the party whose signature to a paper is obtained by fraud as to the character of the paper itself, who is ignorant of such character, and has no intention of signing it, and who is guilty of no negligence in affixing his signature, or in not ascertaining the character of the instrument, is no more bound by it than if it were a total forgery, the signature included. *Walker v. Ebert*, 29 Wis. 194; *Foster v. Mackinnon*, Law Rep. 4 C. P. 704; *Whitney v. Snyder*, 2 Lansing, 477; *Nance v. Lary*, 5 Ala. 370; *Putnam v. Sullivan*, 4 Mass. 45; *Taylor*

v. *Atchison*, 54 Ill. 196; *Wait v. Pomeroy*, 20 Mich. 425; *Caulkins v. Whisler*, 29 Iowa, 495.

In *Walker v. Ebert*, *supra*, the court after referring to several cases, and laying down in substance the above propositions of law, proceeded to say: "The reasoning of the above cases is entirely satisfactory and conclusive upon this point. The inquiry in such cases goes back of all questions of negotiability, or of the transfer of the supposed paper to a purchaser for value, before maturity and without notice. It challenges the origin or existence of the paper itself; and the proposition is, to show that it is not in law or in fact what it purports to be, namely, the promissory note of the supposed maker. For the purpose of setting on foot or pursuing this inquiry, it is immaterial that the supposed instrument is negotiable in form, or that it may have passed to the hands of a *bona fide* holder for value. Negotiability in such cases pre-supposes the existence of the instrument as having been made by the party whose name is subscribed; for, until it has been so made and has such actual legal existence, it is absurd to talk about a negotiation, or transfer, or *bona fide* holder of it, within the meaning of the law merchant. That which, in contemplation of law, never existed as a negotiable instrument, cannot be held to be such; and to say that it is, and has the qualities of negotiability, because it assumes the form of that kind of paper, and thus to shut out all inquiry into its existence, or whether it is really and truly what it purports to be, is *petitio principii*, begging the question altogether. It is, to use a homely phrase, putting the cart before the horse, and reversing the true order of reasoning, or rather preventing all correct reasoning and investigation, by assuming the truth of the conclusion, and so precluding any inquiry into the antecedent fact or premise, which is the first point to be inquired of and ascertained. For the purpose of this first inquiry, which must be always open when the objection is raised, it is immaterial what may be the nature of the supposed instrument, whether negotiable or not, or whether transferred or negotiated, or to whom or

in what manner, or for what consideration or value paid by the holder. It must always be competent for the party proposed to be charged upon any written instrument, to show that it is not his instrument or obligation. The principle is the same as where instruments are made by persons having no capacity to make binding contracts; as, by infants, married women, or insane persons; or where they are void for other cause, as, for usury; or where they are executed as by an agent, but without authority to bind the supposed principal. In these and all like cases, no additional validity is given to the instruments by putting them in the form of negotiable paper. See *Veeder v. Town of Lima*, 19 Wis. 297 to 299, and authorities there cited. See also *Thomas v. Watkins*, 16 Wis. 549."

We proceed to inquire whether, conceding that the appellant signed his name to the note with full knowledge of its character, it is invalid and void for the want of delivery.

The case of *Burson v. Huntington*, 21 Mich. 415, is in all of its facts, incidents, circumstances, and questions of law very similar to the case under consideration, and as the case is well considered, we make an extended quotation from the very able and learned opinion of the court. The court say:

"These facts, if found by the jury, would show, not only that the note was never delivered to the payee, and that it therefore never had a legal existence as a note between the original parties, but that there was yet no completed or binding agreement of any kind, and was not to be until defendant should choose to get a surety on the note, and the payee should give him a deed of territory. Until thus completed, the defendant had a right to retract.

"As a general rule, a negotiable promissory note, like any other written contract, has no legal inception or valid existence, as such, until it has been delivered in accordance with the purpose and intent of the parties. See *Edwards B. & N.* 175, and authorities cited, and 1 *Pars. B. & N.* 48, 49, and cases cited; and see *Thomas v. Watkins*, 16 Wis.

549; *Mahon's Adm'r v. Sawyer*, 18 Ind. 73; *Carter v. McClintock*, 29 Mo. 464.

“Delivery is an essential part of the making or execution of the note, and it takes effect only from delivery (for most purposes); and if this be subsequent to the date, it takes effect from the delivery and not from the date. 1 Pars. *ubi supra*. This is certainly true as between the original parties.

“But negotiable paper differs from ordinary written contracts in this respect: that even a wrongful holder, between whom and the maker or endorser the note or endorsement would not be valid, may yet transfer to an innocent party, who takes it in good faith, without notice and for value, a good title as against the maker or indorser. And the question in the present case is, how far this principle will dispense with delivery by the maker. When a note payable to bearer, which has once become operative by delivery, has been lost or stolen from the owner, and has subsequently come to the hands of a *bona fide* holder for value, the latter may recover against the maker, and all indorsers on the paper, when in the hands of the loser; and the loser must sustain the loss. In such a case there was a complete legal instrument; the maker is clearly liable to pay it to some one; and the question is only to whom.

“But in the case before us, where the note had never been delivered, and therefore had no legal inception or existence as a note, the question is whether he is liable to pay at all, even to an innocent holder for value.

“The wrongful act of a thief or a trespasser may deprive the holder of his property in a note, which has once become a note, or property, by delivery, and may transfer the title to an innocent purchaser for value. But a note in the hands of the maker before delivery is not property, nor the subject of ownership, as such; it is, in law, but a blank piece of paper. Can the theft or wrongful seizure of this paper create a valid contract on the part of the maker against his will, where none existed before? There is no principle of the law of contracts upon which this can be done, unless the facts of the

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case are such that, in justice and fairness, as between the maker and the innocent holder, the maker ought to be estopped to deny the making and delivery of the note. But it is urged that this case falls within the general principle which has become a maxim of law, that when one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss, must sustain it. This is a principle of manifest justice, when confined within its proper limits. But the principle, as a rule, has many exceptions; and the point of difficulty in its application consists in determining what acts or conduct of the party sought to be charged can properly be said to have 'enabled the third person to occasion the loss,' within the meaning of the rule. If I leave my horse in the stable, or in the pasture, I cannot properly be said to have enabled the thief to steal him, within the meaning of this rule, because he found it possible to steal him from that particular locality. And upon examination, it will be found that this rule or maxim is mainly confined to cases where the party who is made to suffer the loss has reposed a confidence in the third person whose acts have occasioned the loss, or in some other intermediate person whose acts or negligence have enabled such third person to occasion the loss; and that the party has been held responsible for the acts of those in whom he had trusted, upon grounds analagous to those which govern the relation of principal and agent; that the party thus reposing confidence in another with respect to transactions by which the rights of others may be affected, has, as to the person to be thus affected, constituted the third person his agent in some sense, and having held him out as such, or trusted him with papers or *indicia* of ownership which have enabled him to appear to others as principal, as owner, or as possessed of certain powers, the person reposing this confidence is, as to those who have been deceived into parting with property or incurring obligations on the faith of such appearances, to be held to the same extent as if the fact had accorded with such appearances.

"Hence, to confine ourselves to the question of delivery, the authorities in reference to lost or stolen notes which have become operative by delivery, have no bearing upon the question. If the maker or indorser, before delivery to the payee, leave the note in the hands of a third person as an escrow, to be delivered upon certain conditions only, or voluntarily deliver it to the payee, or (if payable to bearer) to any other person for a special purpose only, as to be taken to, or discounted by a particular bank, or to be carried to any particular place or person, or to be used only in a certain way, or upon certain conditions not apparent upon the face of the paper, and the person to whom it is thus entrusted violate the confidence reposed in him, and put the note into circulation; this, though not a valid delivery as to the original parties must, as between a *bona fide* holder for value, and the maker or indorser, be treated as a delivery, rendering the note or indorsement valid in the hands of such *bona fide* holder; or if the note be sent by mail, and get into the wrong hands; as the party intended to deliver to some one, and selects his own mode of delivery, he must be responsible for the result. These principles are too well settled to call for the citation of authorities, and manifestly it will make no difference in this respect, if the note or indorsement were signed in blank, if the maker or indorser part with the possession, or authorize a clerk or agent to do so, and it is done. 1 Parsons B. & N. 109-114, and cases cited, especially *Putnam v. Sullivan*, 4 Mass. 45, which was decided expressly upon the ground of the confidence reposed in the third person, as to the filling up, and in the clerk's as to delivery. And when the maker or indorser has himself been deceived by the fraudulent acts or representations of the payee or others, and thereby induced to deliver or part with the note or indorsement, and the same is thus fraudulently obtained from him, he must, doubtless, as between him and an innocent holder for value, bear the consequences of his own credulity and want of caution. He has placed a confi-

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dence in another, and by putting the papers into his hands, has enabled him to appear as the owner, and to deceive others. Cases of this kind are numerous; but they have no bearing on the wrongful taking from the maker, when he never voluntarily parted with the instrument. Much confusion, however, has arisen from the general language used in the books and sometimes by judges, in reference to cases where the maker has voluntarily parted with the possession, though induced to do so by fraud; when it is laid down as a general rule, that it is no defence for a maker, as against a *bona fide* holder, to show that the note was wrongfully or fraudulently obtained, without attempting to distinguish between cases where the maker has actually and voluntarily parted with the possession of the note, and those where he has not.

“We do not assert that the general rule we are discussing—that ‘where one of two innocent parties must suffer,’ etc., must be confined exclusively to the cases where a confidence has been placed in some other person (in reference to delivery) and abused.

“There may be cases where the culpable negligence or recklessness of the maker in allowing an undelivered note to get into circulation might justly estop him from setting up non-delivery; as if he were knowingly to throw it into the street, or otherwise leave it accessible to the public, with no person present to guard against its abduction under circumstances when he might reasonably apprehend that it would be likely to be taken.”

It is quite clear to us that the court erred in sustaining the demurrer to the third paragraph of the answer and in overruling the motion for a new trial.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to grant a new trial and then overrule the demurrer to the third paragraph of the answer, and for further proceedings in accordance with this opinion.

S. K. Wolfe, for appellant.

J. Y. Allison, and W. T. Friedley, for appellee.

The Indianapolis, Bloomington, and Western R. W. Co. v. Ferguson.

THE INDIANAPOLIS, BLOOMINGTON, AND WESTERN RAILWAY
Co. v. FERGUSON.

PRACTICE.—Evidence.—Cross - Examination of Plaintiff.—Where the cause assigned in a motion for a new trial was, that the court erred in refusing to permit a question to be asked the plaintiff on his cross-examination, and there was no evidence showing that the question was as to matters testified to by the witness on his examination in chief;

Held, that the overruling of the motion was not error.

SAME.—Damages on Affirmance.—Stay of Execution.—Damages cannot be given in the Supreme Court on affirmance, unless there has been a stay of execution.

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APPEAL from the Montgomery Circuit Court.

DOWNEY, J.—This was an action by the appellee against the appellant, to recover the value of a house and furniture therein of the appellee, which it is alleged was negligently set on fire by sparks from a locomotive of the appellant. The issue was formed by a general denial of the complaint. There was a trial by a jury, a verdict for the plaintiff, a motion for a new trial overruled, and judgment on the verdict.

The only alleged error properly assigned is the refusal of the court to grant a new trial.

There is a bill of exceptions showing that “after the plaintiff had been examined in chief, as a witness in his own behalf, the attorney for the defendant asked him the following question, on cross-examination, to wit: ‘How much was the farm, upon which the house stood, about which you have testified, depreciated in value by the burning of said house?’” The court, on objection by the plaintiff, refused to allow the question to be answered.

No point is discussed or insisted upon, except as to the refusal of the court to allow the answer to this question on cross-examination.

Although the question to the witness assumes that he had testified about the house, it does not appear what his testimony was, or that the question asked was relevant to the

 Cutler v. The State.

matter concerning which the witness had given evidence in his examination in chief. A cross-examination must be limited to the matters about which the witness has testified in his first examination. The court may have refused to allow the witness to answer the question because the cross-examination attempted did not conform to this rule.

We are asked by counsel for the appellee to give damages on the affirmance of the judgment. But we cannot do this, for the reason that it does not appear that there has been any stay of execution in the case, either by the execution of an appeal bond, or by obtaining a supersedeas and giving bond. It is only in such cases that damages can be awarded on an affirmance of the judgment by this court. 2 G. & H. 276, sec. 569.

The judgment is affirmed, with costs.

J. C. Black, P. S. Kennedy, and W. T. Brush, for appellant.

J. McCabe and T. Patterson, for appellee.

CUTLER v. THE STATE.

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PRACTICE.—*Affidavit for Continuance.—Illness of Witness.—Attachment.—*

Where, in a criminal action, an affidavit for a continuance shows that witnesses, who have been duly summoned, are prevented from attending court by sickness, it is proper to refuse to issue an attachment for them. The fact of the illness of the witnesses may be proved by the affidavit of the defendant or of any one else having knowledge of the matter.

SAME.—*Truth of Facts Stated.—Appeal.—*Where the defendant in a criminal action, moving for a continuance on account of the absence of witnesses, shows the competency of the witnesses, the materiality of their testimony, that they have been duly and legally summoned, and the other facts specially required by the statute, he is entitled to a continuance without regard to the cause of their absence. The court must decide the motion for a continuance upon the facts stated in the affidavit alone, accepting the same as true; and on appeal this court will not look at the evidence given on the trial, but to the affidavit alone.

APPEAL from the Newton Circuit Court.

BUSKIRK, J.—The appellant was indicted in the White Circuit Court, for the larceny of a heifer, which was alleged to be the personal property of Amos Ludy. The venue was changed to the Newton Circuit Court, where the cause was tried by a jury and resulted in a verdict of guilty. The court overruled a motion for a new trial, and rendered judgment on the verdict.

The appellant has assigned for error the overruling of his motion for a new trial.

The first reason assigned for a new trial was the refusal of the court to continue the cause upon the application of appellant supported by his affidavits. The motion and affidavits are properly in the record by a bill of exceptions. The first affidavit was filed on the 5th day of June, 1873, and a continuance was asked on account of the absence of Daniel Hickman, Lorin Cutler, and Elizabeth Cutler, by whom appellant proposed to prove that the heifer in controversy never was the property of Amos Lucy; that said heifer had been calved the property of one George Cutler, who had sold the same to Lorin Cutler, who had sold the same to appellant a short time before he had sold her to Martin Witz. It was further shown by the affidavit and return of the sheriff, that such absent witnesses had been duly and legally summoned. It was further shown by the affidavit that such witnesses were prevented from attending court by sickness. All the statutory requirements were complied with. The court refused to continue the cause, but postponed the trial thereof until the 10th day of said month.

On the 10th day of the month the appellant filed another affidavit, in which it was shown that Daniel Hickman had so far recovered as to be present in court, but that Lorin and Elizabeth Cutler were still unable to attend, by reason of their continued sickness; that although a part of the facts stated in the affidavit of June 5th are known to the witness Daniel Hickman, the said witnesses, Lorin Cutler and Elizabeth Cutler, are fully acquainted with all the facts respecting

the ownership of said heifer, and will, if their attendance can be procured, testify to the pedigree, description, and ownership of said heifer, as stated in his previous affidavit. All the averments required by the statute were contained in this affidavit. The court overruled the motion, refused to continue the cause, and required the appellant to go to trial, in the absence of such witnesses.

After the cause was postponed on the 5th day of June, the appellant asked the court to order attachments for such absent witnesses, which the court refused to do; and this ruling is complained of by appellant. We have been furnished with a brief by the prosecuting attorney of the circuit where the case was tried, in which it is insisted that the court properly refused to order an attachment, because no affidavit was filed making specific charges against such witnesses, as for contempt; and we are referred to *Whitem v. The State*, 36 Ind. 196, as supporting such position. No such question was involved or decided in that case. In that case the court ordered an attachment against Whitem, who was a defendant in an action for seduction, for the forcible abduction of the female infant plaintiff, and who had been subpoenaed as a witness. We held that the proceeding against Whitem was for a constructive criminal contempt, and that the court had no right to order an attachment without an affidavit specifically setting forth the facts showing the contempt. Our ruling in that case in no manner changes the rules of law and practice as to attaching witnesses for a failure to obey the process of the court. The ruling of the court below, in the present case, in refusing to order an attachment, was clearly right, for the reason that the affidavit of appellant showed that they were prevented from attending by severe sickness.

It is insisted by counsel for appellee, that the court correctly refused a continuance of the cause, because the appellant did not file the affidavit of some respectable physician, showing the nature and extent of the sickness of the witnesses for whose absence the continuance was asked.

The position is wholly untenable. If it was necessary to show that the witnesses were prevented from attending court by reason of sickness, the fact might be shown by the affidavit of the appellant or any other person who knew the fact. We know of no principle of law or rule of practice which requires the affidavit of a physician to show the sickness of a witness.

But the right of the appellant to a continuance did not in any respect depend upon the question of whether the absent witnesses were prevented from attending court by reason of sickness. When the appellant had shown the competency of the witnesses, the materiality of their testimony, that they had been duly and legally summoned, and the other facts specially required by the statute, he was entitled to a continuance, without any reference to whether they were prevented from being present by sickness. The fact of their absence, and not the cause of such absence, entitled him to a continuance.

It is next insisted that the court committed no error in overruling the application for a continuance, for the reason that there were other witnesses present in court who testified to the same facts which were expected to be proved by the absent witnesses. The court below was bound to decide the motion for a continuance upon the facts stated in the affidavits. The court below had no right to receive counter affidavits, but was conclusively bound to take the facts stated in the affidavit to be true.

In determining whether the court erred in refusing a continuance, we look alone to the affidavits, and cannot examine the evidence in the record, to see whether the appellant was or was not injured by such refusal. The credibility of the witnesses, and the weight which should have been given their testimony, were questions which belonged exclusively to the jury.

In passing upon the sufficiency of the affidavits, we have no right to look to the evidence, to determine whether the appellant was or was not guilty. If the facts stated in the

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affidavit had been proved, the result might have been very different, for if it was true as therein stated, that the property alleged to have been stolen never was the property of the person named in the indictment, but was the property of the appellant at the very time when it is charged he had stolen it, he was not and could not have been guilty.

It is quite clear to us that the court erred in refusing to continue the case, for which error the judgment must be reversed. See *Jenks v. The State*, 39 Ind. 1.

The judgment is reversed; and the cause is remanded for another trial. The clerk will immediately direct the warden of the northern state prison to return the prisoner to the jail of Newton county.

S. A. Huff, C. H. Test, and D. V. Burns, for appellant.

J. C. Denny, Attorney General, and *S. P. Thompson*, for the State.

ARNOLD v. NORTON ET AL.

PRACTICE.—Judge.—Cause Dropped from Docket by Mistake.—Notice.—

Where, in a case pending in the circuit court, on account of the judge having been of counsel therein a judge of the common pleas court was called in, and a time was fixed for the trial, but the judge called failed to attend;

Held, that the case should have been continued on the general docket of the circuit court by the clerk; and he having, by mistake, dropped it from that docket, and entered it upon the common pleas docket, from which it was struck on motion, he should have re-entered it upon the circuit court docket, and on failure to do so should have been so ordered by the court, on motion of a party, without any notice being required to be given the other party.

APPEAL from the Vigo Circuit Court.

OSBORN, C. J.—The record in this case shows that at the September term of the Vigo Circuit Court for the year 1868, an order was made stating that the judge of that court having been of counsel in the cause, it was set down for hearing

before Hon. John T. Scott, Judge of the Vigo Common Pleas Court, at a special term on the fifth day of January, 1869; that the clerk by mistake docketed the action in the common pleas court, and that the court ordered it stricken from its docket; that Judge Scott failed to preside as judge of the circuit court on the day fixed therefor; that in October, 1869, the appellant, who was the plaintiff below, moved the circuit court to reinstate the cause upon the docket, which motion was overruled. She excepted, and has appealed from the judgment overruling her motion.

The appellees insist that the bill of exceptions setting out the affidavit in support of the motion is not properly in the record. It appears by the record of the proceedings, that when the motion to reinstate was overruled, the appellant excepted and filed her bill of exceptions, which was signed and made a part of the record in the case. Counsel seem to have overlooked that entry.

The appellees also insist that, inasmuch as the cause had been dropped from the docket for a term of the court, it could not be again entered upon the docket, and if it could, that the defendant was entitled to notice of the motion.

When Judge Scott failed to appear on the day fixed for the trial of the cause, it was not thereby discontinued, but it passed to, and was by operation of law upon, the general docket of the circuit court, and the clerk should have entered it as one of the continued causes. The mistake of the clerk in transferring the cause to the court of common pleas, and his failure to enter it upon the docket of the circuit court, ought not to prejudice the plaintiff. If he refused or failed to place the case upon the docket, it was proper to move the court to have the entry made, and no notice of such motion was necessary. The case was in court, and ought to be upon the docket. If the judge had been of counsel in the cause, he could fix a time and call another judge to hear the motion and try the cause. *Singleton v. Pidgeon*, 21 Ind. 118.

No question is made about the judge. The facts stated

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in the affidavit and the record show that the motion should have been granted.

The judgment of the said Vigo Circuit Court is reversed, with costs, with instructions to sustain the motion to reinstate said action and enter it upon the docket of said court, and for further proceedings not inconsistent with this opinion.

J. W. Gordon, P. H. Ward, T. M. Browne, R. N. Lamb, and J. N. Kimball, for appellant.

J. M. Allen, W. Mack, and J. W. Davis, for appellees.



WILLETT ET AL. v. PORTER ET AL.

PLEADING.—Contest of Will.—The proceeding to contest a will is statutory; and the statute (2 G. & H. 559, sec. 39) providing that any person may “contest,” etc., “by filing in the proper court his allegation in writing, verified by his affidavit setting forth,” etc., is complied with when the complaint has been sworn to by any one or more of the plaintiffs.

SAME.—Unsound Mind.—In a proceeding to contest a will, the general allegation that the testator was of unsound mind includes every species of unsoundness of mind.

SAME.—Will.—Undue Execution of.—In such proceeding, the allegation that the will was unduly executed includes duress, fraud, and whatever else goes to show undue execution.

SAME.—Parties.—Defect of.—A demurrer to a complaint on the ground of a defect of parties defendants should be overruled, where it is not shown who ought to be made defendants.

PRACTICE.—Return of Verdict.—Clerk.—The clerk of a court cannot, by agreement of the parties to an action, in the absence of the judge, preside at the return of the verdict and during the polling of the jury, receive the verdict, and discharge the jury.

JURISDICTION.—Circuit Court.—Court of Common Pleas.—Change of Venue.—A proceeding to contest a will is required to be commenced in the court of common pleas, but the transfer of the same from the common pleas to the circuit court may be presumed to be governed by the statute providing for change of venue to the circuit court.

SAME.—The parties to such a proceeding in the court of common pleas, having agreed of record that the proceeding should be transferred to the circuit

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court, which had jurisdiction of the subject-matter, and in the latter court having appeared and gone to trial without objection, could not afterward object that the transfer had been erroneously granted.

PRACTICE.—Evidence.—Immaterial matter in a complaint may be struck out on motion, or evidence offered in support of it may be rejected.

EVIDENCE.—In a proceeding to contest a will on the ground of the unsoundness of mind of the testator and the undue execution of the will, evidence of the amount of property the widow owned when she married the testator was held inadmissible.

SAME.—In such a proceeding, evidence is inadmissible, that the widow in the lifetime of the testator, after the will was made, filed a petition for divorce from the testator, then her husband, which was pending at the time of his death.

• APPEAL from the Hancock Circuit Court.

DOWNEY, J.—This was a proceeding to contest and set aside the will of Isaac Willett, deceased, and the probate thereof, instituted by the appellees, who are children and grandchildren of the deceased, against the appellants, who are the widow and certain others of his grandchildren.

The widow, it is alleged, was the second wife of the deceased. The complaint is in one paragraph.

It is alleged that at the time of the marriage of the deceased to the said Selinda, his last wife, his property was worth about seventeen thousand dollars, while hers was worth about fifty or seventy-five dollars, he having the children and grandchildren mentioned in the complaint; that in 1859 he became afflicted with *hemiplegia*, losing entirely the use of one side of his body, and became sick, weak, helpless, and of unsound mind, and remained so until the day of his death, which was the fourth of April, 1867. It is charged that Selinda, contriving and intending fraudulently to deprive the said plaintiffs of their inheritance, and to procure and appropriate the same exclusively to herself and her heirs forever, did on the 18th of October, 1864, falsely and fraudulently influence, induce, persuade, and procure the said Isaac Willett to make and cause to be made and executed the will in question; that the making of said will was procured by persuasion, undue influence, fraud, and deceit; that at the time of the making of said will, the

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deceased was sick, weak, and debilitated with age and *hemiplegia*, one side of his body, including one side of his head, one arm and leg paralyzed, and he almost helpless in body, and weak and unsound in mind and memory, for a long time before, at the time of making the will, and remained so until his death; that immediately after the making of said will, the said Selinda ordered and directed one Henry Dunn, a witness thereto, never to talk about or speak of the will, and herself took possession of the same and kept it concealed from the plaintiffs, and soon afterward commenced complaining of and expressing dissatisfaction with said deceased, his home, and society, and abandoned him in his affliction, and brought an action in the Hancock Circuit Court for a divorce and alimony, which was pending and untried at the time of his death; that on the next day after the deceased was buried, she had said will proved by the witness Dunn, and had the same recorded; wherefore, etc. By the will, a copy of which is in the record, the deceased devised to four of his grandsons forty acres of land each, the devise to each one to take effect when he arrived at the age of twenty-one years. To his wife he gave the residue of his estate, "to have and to hold the same to her, her executors, administrators and assigns, absolutely and forever."

Subsequently, the plaintiffs amended their complaint by alleging as new objections to the will, that "it was not duly executed, but was unduly executed; that the deceased, at the time of executing it was of unsound mind, and that, after the making of the will, when he was in a sound state of mind, in 1865, with the intention of revoking and destroying the same, he requested his said wife to hand the same to him, and that she, to deceive, cheat, and defraud the children and heirs of the deceased, and to mislead and deceive her husband, falsely pretended to deliver the same to him, but in fact delivered to him another and different paper, which he believed to be the said will, and that he so believing, without examining it, with the intention of revoking and destroying the same, threw the

same into the fire, to be consumed thereby, and which paper was then and there consumed; and he ever afterward believed that he had revoked and destroyed the same in the manner stated; wherefore," etc. The complaint and amendments thereof are verified by Thomas Osborn only, one of the plaintiffs.

The defendants moved the court to dismiss the action as to all the plaintiffs who had not sworn to the complaint; but their motion was overruled, and they excepted by bill of exceptions.

The defendants demurred to the complaint, for the reasons that it did not state facts sufficient to constitute a cause of action, because the same was not verified by the affidavits of the plaintiffs, and because there was a defect of parties defendants. This demurrer was overruled, and the defendants then answered by a general denial of the complaint. The cause was tried by a jury, and there was a general verdict for the plaintiffs, with answers to certain interrogatories.

The defendants objected to the verdict, and moved to set it aside, and for a *venire de novo*, on the grounds, 1. It was not the verdict and finding of each of said jurors. 2. Because, on the return of the verdict, on polling the jury, one of them answered that he consented to it, "but it was not as he wished," and on the question being repeated, refused to answer; and thereupon the defendants moved that the jury be directed to retire to their room and consider further of their verdict, to which the plaintiffs objected, and the court refused to order the jury to retire, and said paper was received by the clerk as the verdict of the jury. 3. Because, on Saturday morning of the day on which said verdict was returned by the jury, the judge of the court not being a resident of said county, it was not convenient for him to remain over Sunday; it was therefore agreed by the attorneys for the parties, that the clerk of said court should receive the verdict instead of the court, in the presence of the parties and attorneys; that the jury, in the afternoon of said day, returned said verdict to the clerk of said court, in the court

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room, in the presence of the parties and the attorneys, and thereupon the defendants proceeded to poll the jury; and upon polling them, one of jurors refused to answer that the verdict was his verdict, and the jury was discharged. These objections and motion were overruled. The defendants then moved the court to grant them a new trial, which motion was also overruled. They then moved in arrest of judgment, because the court had no jurisdiction of the subject-matter of the action, and this motion was also overruled. The court then rendered final judgment setting aside the will and the probate thereof, from which the defendants appealed to this court.

Among the errors properly assigned are the following:

1. The refusal of the court to dismiss the action as to the plaintiffs who had not sworn to the complaint.
2. The refusal to order a *venire de novo*.
3. Overruling the motion in arrest of judgment.
4. Overruling the motion for a new trial.
5. The court erred in overruling the defendants' demurrer to the complaint.

Properly, we should dispose of the last assigned error first. Counsel for the appellants contend that the complaint is in four paragraphs, and they seek to attack it in that form. We do not think it can be regarded as containing more paragraphs than one. We think it sufficiently alleges the unsoundness of mind of the testator, and the undue execution of the will, the first of which includes every species of unsoundness of mind, and the last includes duress, fraud, or whatever else goes to show undue execution. *Kenworthy v. Williams*, 5 Ind. 375; *Reed v. Watson*, 27 Ind. 443. There are some immaterial matters stated in the complaint. The part of the complaint relating to the attempted revocation of the will seems to have been rendered unimportant by the finding of the jury as to that part of the case in favor of the defendants. See *Runkle v. Gates*, 11 Ind. 95. If there was a defect of parties defendants, it is not shown who else ought to have been defendants.

Next in order, we should consider the first alleged error; that is, the refusal of the court to dismiss the action as to the plaintiffs who had not sworn to the complaint. The proceeding to contest the validity of a will is statutory. What the statute, by a fair construction, requires, must be done, in order to sustain the proceeding. Any person may contest the validity of any will, or resist the probate thereof, at any time within three years after the same has been offered for probate, by filing in the proper court his allegation in writing, verified by his affidavit, setting forth, etc. 2 G. & H. 559, sec. 39. The allegation of the party contesting must be verified by his affidavit. This requirement of the statute, in the opinion of a majority of the court, is complied with when the complaint has been sworn to by any one or more of the plaintiffs.

The next question relates to the refusal of the court to set aside the verdict of the jury and award a *venire de novo*. The facts relied upon in the motion are shown by the bill of exceptions to be true. Were we to sanction the practice resorted to in this case, in thus substituting, even by the agreement of counsel, the clerk of the court, or some one else, in the place of the judge of the court, and hold that such person could legally hold the court, preside at the return of the verdict and during the polling of the jury, receive the verdict, and discharge the jury, we should never know where to stop. We must hold that the verdict, under the circumstances shown, without reference to the answer of the juror as to his dissatisfaction with it, was wholly invalid, and that the court should have set it aside and awarded a *venire facias de novo*. See *Trout v. West*, 29 Ind. 51. The policy of our legislation allowing the judges of the courts to depute some one else to act in their place is not so clearly beyond question as to justify any wide departure from the terms of those enactments.

We are unable to see any merit in the motion in arrest of judgment. The ground of the motion was the supposed want of jurisdiction of the court of the subject-matter of the

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action. It is true that the statute required the action to be commenced in the common pleas, and not in the circuit court. The action was commenced in the common pleas, but by agreement of the parties it was transferred to the circuit court. In some cases there may be a change of venue from the common pleas to the circuit court. 2 G. & H. 21, sec. 10. It may be presumed that the case was one governed by this statute. Where the court to which the change has been granted has jurisdiction of the subject-matter, and the parties have agreed to the change, the agreement entered of record gives jurisdiction to the court to which the change is taken; and if the parties appear and go to trial, without making any objection, as in this case, they can not afterward object that the change was erroneously granted. *Judah v. The Trustees of Vincennes University*, 23 Ind. 272; *Garner's Adm'r v. Board*, 27 Ind. 323.

Next, as to the questions which arise out of the overruling of the motion for a new trial. We do not propose to examine all these questions.

The plaintiffs were allowed to prove, over the objection of the defendants, the amount of property which the widow owned at the time of her marriage to the deceased. This is one of the immaterial matters alleged in the complaint, and it was proper for the defendant either to move to have it stricken out or to object to any evidence offered in support of it. If there was any legal reason why this evidence should have been admitted, we do not see it. We think it was inadmissible.

The court also, over the objection of the defendants, admitted in evidence the petition for a divorce which had been filed by the said Selinda against her husband, and which was pending at the time of his death. The proceeding for a divorce was commenced some time after the will was made. We are unable to see what bearing it could have upon the real questions involved in this case, and think it was improperly admitted. It may have misled the jury, to the prejudice of the appellants.

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The judgment is reversed, with costs, and the cause remanded, with instructions to grant a new trial.

W. March, W. R. Hough, and A. W. Hough, for appellants.

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PRACTICE.—*Special Finding.*—Where a special finding of facts is made by the court, not having been demanded by either party, it will not be considered on appeal as being more than a general finding.

DOWER.—*Assignment of.*—*Demand.*—*Time of.*—Under the Statute of 1843, p. 804, sec. 67, the persons entitled to the freehold were not liable to an action for the assignment of dower, until thirty days after demand for such assignment. Accordingly, where the evidence failed to show when the demand was made, there could be no recovery.

APPEAL from the Madison Circuit Court.

OSBORN, C. J.—On the 20th day of September, 1870, the appellants filed their complaint and commenced an action against the appellees. The complaint alleges, that in 1852, Seth Smith died intestate, seized in fee simple of certain land situate in Madison county, which is described in the complaint; that he left surviving him Sarah D. Smith, his widow, and three children. The children are the appellees and were the defendants below. It is further alleged, that in January, 1868, the appellants recovered a judgment in the court of common pleas of Madison county against Sarah D. Smith, the widow, for \$965.14, and a decree to sell all of her interest in the land; that a copy of the decree was issued by the clerk and placed in the hands of the sheriff, under which he sold and conveyed the land to the appellants, in May, 1869; that on the 1st day of September, 1870, they demanded of the appellees "that they assign to them one-third of said real estate for the life of said Sarah D. Smith,

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as her dower interest therein, which they refused to do." It is also alleged that Sarah is still alive. Prayer for the appointment of commissioners to assign one-third of the land to them during her life, for a judgment for damages, and other proper relief.

A demurrer was filed to the complaint, which was overruled, to which exception was taken. The appellees then filed an answer of general denial. The cause was tried by the court. A special finding of the facts and conclusions of law appear in the record, but as they were not demanded by either party, we cannot regard them as legitimately in the record under section 341, 2 G & H. 207. There is enough in the finding, however, to answer for a general finding for the appellees.

The appellants moved the court for judgment against the appellees on the special finding, which was overruled, and they excepted. They also filed a motion for a new trial, assigning several reasons therefor, only two of which are causes for a new trial: 1st. The decision of the court is not sustained by sufficient evidence; and 2d. The decision of the court is contrary to law.

Four errors are assigned: 1st. That the court erred in overruling the motion for a new trial. The 2d, 3rd, and 4th relate to alleged errors in the action of the court on the special finding and conclusions of law. They raise no question, for the reason before stated.

The evidence is set forth in a bill of exceptions, by which it is established that Seth Smith died in February, 1852, seized in fee simple of the real estate described in the complaint, leaving Sarah D. Smith, his widow, and the appellees, his only children; that on the 26th day of January, 1867, the widow executed to the appellants a mortgage, with covenants of warranty in the statutory form, upon the land, which was duly acknowledged and recorded; that at the January term of 1868, of the Madison Common Pleas, the appellants recovered a judgment of foreclosure of the mortgage; that a copy of the decree and order of sale was issued by the

clerk of the court, directed to the sheriff of Madison county, by virtue of which he sold and conveyed the land to the appellants; that before the commencement of the action, the appellants demanded of the appellees to make an assignment of the dower interest of the widow, Sarah D., in the land, and that they refused to do it. The evidence does not disclose when the demand was made. The only witness on that subject, W. R. Pierse, testified, that "before this suit was brought, the plaintiffs demanded of the defendants to have the dower assigned of the land in controversy, which they refused to do."

Sec. 67, Rev. Stat. 1843, p. 804, provided; that if dower was not assigned within thirty days, next after demand, it might be assigned by commissioners to be appointed by the court. Section 68 gave to the widow the election to proceed by bill in chancery, by petition and summons or publication. It has been frequently held by this court, that no action would lie for an assignment of dower until after demand. *Dunn v. Loder*, 5 Blackf. 446; *Boyers v. Newbanks*, 2 Ind. 388; *Wells v. Sprague*, 10 Ind. 305. The evidence in the case does not show that the demand was made thirty days before the action was brought. Until that time had elapsed, those entitled to the freehold were not liable to an action. The law gave them that length of time to make the assignment. If not done within that time, the widow might institute proceedings to have it assigned to her.

The judgment of the said Madison Circuit Court is affirmed, with costs.

W. R. Pierse and *H. D. Thompson*, for appellants.

C. D. Thompson, *J. L. Smith*, *J. W. Sansberry*, and *E. B. Goodykoontz*, for appellees.

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KNARR v. CONAWAY ET AL.

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FORECLOSURE.—*Agreement to Release.—Reformation of Instrument.*—To a suit to foreclose a mortgage upon different pieces of real property, one of the defendants answered that he had purchased one piece of the property mortgaged from his co-defendant, the mortgagor; and in consideration of the payment of a certain sum to the plaintiffs by this defendant, the plaintiffs were to release the land from the mortgage, and the plaintiff G., for himself, signed the deed conveying the property, but by mistake failed to sign also, as had been agreed, for his sisters, his co-plaintiffs, whose agent he was. A reformation of the deed was asked.

Held, on demurrer, that the facts entitled the defendant to a reformation of the deed, but that such reformation was not necessary to defeat the suit as to the land conveyed.

PLEADING.—*Paragraph.*—Each paragraph of an answer must be complete in itself, and a failure to describe the piece of land sought to be released from the lien of a mortgage would be a fatal defect in such paragraph.

MORTGAGE.—*Waste.—Duty of Mortgagee and Purchaser.*—It is not the duty of either a mortgagee or the purchaser of the equity of redemption of a part of the property mortgaged, although it is his right, to enjoin the committing of waste; and the failure so to do furnishes no ground for requiring an account from the mortgagee, at the instance of such purchaser, and a credit upon the mortgage debt of the amount of waste committed upon other pieces of property included in the mortgage.

PRACTICE.—*Change of Venue.—Rule of Court.*—Unless a rule of court limiting the time for making application for a change of venue be made a part of the record, this court cannot on appeal notice the existence of such a rule.

DECREE.—*Form of.—Judicial Sale.*—A decree giving the plaintiff the right to direct the sale of different pieces of property, on foreclosure, is erroneous. The court should direct the order of sale in the decree.

APPEAL from the Ripley Circuit Court.

BUSKIRK, J.—This was an action by the appellees against Louis Freyer, Katharina Freyer, John H. Wenkle, and the appellant. The purpose of the action was to obtain a foreclosure of a mortgage executed by Louis Freyer and wife to the appellees; and John H. Wenkle and appellant were made defendants, because they claimed some interest in the lands mortgaged, and they were required to set up such interest.

All of the defendants, except the appellant, made default. The appellant filed an answer consisting of seven paragraphs.

A demurrer was sustained to the second, fifth, and seventh paragraphs, and an exception was taken.

Issue was joined on the other paragraphs. The appellant moved the court for a change of venue from the judge on account of his bias and prejudice. The motion was overruled, and the question was reserved by a bill of exceptions.

There was a trial by the court, a finding for the plaintiffs against the appellant, an assessment of damages against Freyer and wife, and a foreclosure of the mortgage. In the decree, the court ordered that the lands described in the complaint should be sold in parcels as the plaintiffs might direct, to which the appellant excepted.

The appellant's motion for a new trial was overruled, and an exception was taken. The other defendants were duly notified of this appeal.

The appellant has assigned the following errors:

1. That the court erred in sustaining the demurrer to the second, fifth, and seventh paragraphs of the answer.
2. In overruling the motion for a change of venue.
3. In overruling the motion for a new trial.
4. In decreeing that the lands mortgaged should be sold in parcels as the plaintiffs might direct.

The first question presented for our decision is; whether the court erred in sustaining the demurrer to either the second, fifth, or seventh paragraphs of the answer.

The second paragraph of the answer and the exhibit filed therewith read as follows:

" 2d Par. For further answer, defendant says that he is the owner, by purchase from Louis Freyer and wife, for a valuable consideration, of the south-west quarter of the north-east quarter of section twenty-four, township ten, north of range twelve east, containing forty acres, being one of the tracts of land described in said mortgage. A copy of the deed from Freyer and wife to this defendant is filed herewith, marked exhibit A; that said plaintiffs, in consideration of the sum of seven hundred and ninety-one dollars to them by said defendant paid, agreed to release said tract of land from

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the lien of said mortgage, and, in pursuance of said agreement, said George Conaway, for himself and as the duly and legally authorized agent of his sisters, his co-plaintiffs, Jane and Fulvia Conaway, signed said deed, for the purpose of releasing said tract of land from the lien of the mortgage in plaintiffs' complaint mentioned; that by mistake said George Conaway neglected to sign said deed as the agent of said Jane and Fulvia.

"Wherefore defendant demands judgment for the reformation of said deed and that said mortgage, as to the tract of land herein described, may be declared satisfied, and for costs."

The deed filed with the above answer was in the statutory form of a warranty deed, for the above described tract of land; the consideration was stated to be twelve hundred dollars. The deed was signed by Louis Freyer, Katharina Freyer, and G. F. Conaway, and was dated July 13th, 1868.

The mortgage from Freyer and wife to the appellees was executed the 24th of December, 1867.

The fifth paragraph of the answer was as follows:

"5th Par. For further answer defendant says that said Jane and Fulvia Conaway sold and transferred to said George Conaway all their interest in said notes, and that afterward the said George Conaway, in consideration of the sum of seven hundred and ninety-one dollars, to him paid by defendant, agreed to release the lien of said mortgage on said tract of land hereinbefore described; wherefore," etc.

The seventh paragraph of the answer was as follows:

"7th Par. That Louis Freyer and wife mortgaged the tracts of land, in the mortgage particularly described, to said plaintiffs, to secure the payment of the four notes therein referred to; that said tracts of land were, on the 13th day of July, 1868, worth the sum of four thousand dollars. At which date the said Louis Freyer and wife sold and conveyed to this defendant the south-west quarter of the north-east quarter of section 24, town 10, north of range 12 east, containing 40 acres, of which said plaintiffs had notice, and

to which said sale and conveyance plaintiffs consented and received the consideration therefor, and that said conveyance was upon a valuable consideration; that at the time of said conveyance the remaining two tracts of land were worth the sum of two thousand eight hundred dollars; and that the condition of said mortgage was at that time broken; and the remaining tracts were amply sufficient to satisfy the same; that of the consideration paid by defendant to said Louis Freyer for the tract of land conveyed to defendant, the sum of seven hundred and ninety-one dollars was paid to said George, Jane, and Fulvia Conaway, to be credited on the notes secured by said mortgage, and which amount was so credited. And defendant avers that after the sale and conveyance of said forty-acre tract of land by said Louis Freyer and wife to defendant, said plaintiffs permitted said Louis Freyer, John H. Wenkle, and others to enter upon the two tracts of land first in said mortgage described and commit waste by cutting and removing from said tracts of land valuable timber trees, to the amount of fifteen hundred dollars, and took no steps to prevent said waste until said fifteen hundred dollars' worth of trees had been cut and removed. Of all which said George F., Jane, and Fulvia Conaway then and there had notice; and defendant avers that said George was at and during all said time the agent of his co-plaintiffs, who are residents of the State of Ohio, for the collection of said notes and the preservation of said security; and defendant avers that by reason of the plaintiffs' negligence in permitting said waste, said security remaining to plaintiffs has become deteriorated and is not now sufficient to satisfy plaintiffs' mortgage, as defendant is informed.

"Wherefore defendant demands judgment that the said sum of seven hundred and ninety-one dollars may be declared a satisfaction of said mortgage lien on the tract of land purchased by him to that extent, that an account be taken of the extent of the waste permitted by said plaintiffs to be committed on the other two tracts of land included in said

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mortgage, and that the amount thereof may be a satisfaction of the mortgage lien of the plaintiffs on defendant's tract of land so far as it is a reduction of the amount of their security upon the other two tracts, and for all other and proper relief; and defendant demands judgment for costs.'

Did the court err in sustaining the demurrer to the second, fifth, and seventh paragraphs of the answer?

The substance of the second paragraph is, that the appellant purchased from Freyer and wife, the mortgagors, one of the tracts of land described in the mortgage; that the mortgagees agreed, in consideration of the sum of seven hundred and ninety-one dollars, paid them by appellant, to release such tract of land from the lien of such mortgage; that George Conaway was the agent of his sisters, his co-mortgagees, and in pursuance of such agreement, signed such deed for the purpose of releasing said tract of land from such lien; and that by mistake he omitted to sign such deed as the agent of his sisters.

In our opinion, the facts stated entitled the appellant to have the instrument so reformed as to express the real agreement of the parties. A mistake in a written instrument may be corrected and judgment rendered in one and the same action. Sec 71 of the code, 2 G. & H. 98; *Rigsbee v. Trees*, 21 Ind. 227; *Conger v. Parker*, 29 Ind. 380.

We are also of opinion that such paragraph was good without a reformation of the deed. A mortgage is a mere security for a debt. The title to the land remains in the mortgagor. *Francis v. Porter*, 7 Ind. 213; 1 Hilliard Mortg. 471, sec. 50.

A mortgage may be released by parol. *Mauzey v. Bowen*, 8 Ind. 193, and the authorities cited in notes 1 and 2.

The court erred in sustaining a demurrer to the second paragraph of the answer.

The fifth paragraph of the answer is, in our opinion, bad. Each paragraph of the answer must be complete within itself, and in this paragraph there is nothing showing what tract of land was to be released.

The court committed no error in sustaining the demurrer to this paragraph.

The seventh paragraph presents a question of greater difficulty, and that is, whether, upon the facts stated, it was the duty of the mortgagees to prevent the commission of waste. Although a mortgagor in possession is regarded for most purposes as the owner of the land, and as such entitled to the temporary annual rents and profits; yet, inasmuch as the very purpose of the mortgage would be defeated by any acts affecting the permanent value of the property, no point of law is better settled than that a court of equity will grant an injunction to restrain waste by the mortgagor or those claiming under him, when it is such as may render unsafe the debt secured by the mortgage. And the law is as well settled, that the purchaser of a part of the lands mortgaged may have such injunction, for he stands in the light of a surety of the mortgage debt. 1 Hilliard Mortgages, 206; 2 Story Eq., secs. 914, 915; Eden Injunctions, 205; *Gray v. Baldwin*, 8 Blackf. 164; *Johnson v. White*, 11 Barb. 194; *Brady v. Waldron*, 2 Johns. Ch. 148; *Campbell v. Macomb*, 4 Johns. Ch. 534; *Goodman v. Kine*, 8 Beavan, 1379; *Hanson v. Derby*, 2 Vern. 392; *Farrant v. Lovel*, 3 Atkyns, 723.

But we have been unable, after a thorough and diligent search, to find any authority holding that it was the duty of either the mortgagee or purchaser of the equity of redemption of a part of the lands mortgaged to enjoin the committing of waste, or that the failure of the mortgagee to enjoin the commission of any acts affecting the permanent value of the property mortgaged would release from the mortgage the property so purchased. It results that the appellant and appellees having permitted the waste by the mortgagor, the lands purchased by the appellant are subject to the mortgage, and that he cannot have an account taken of the depreciation in the value of the other lands embraced in the mortgage, and treat the same as a satisfaction *pro tanto* of the mortgage.

We are of opinion that the court committed no error in

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sustaining the demurrer to this paragraph of the answer.

Did the court err in overruling the application for a change of venue? The affidavit fully complied with all the requirements of the statute. Counsel for appellees insist that the court correctly refused to change the venue, because, under a rule of court, the application was made too late. No such question arises in the record. The rule of court relied upon is not made a part of the record, the only reference thereto being in the brief of counsel for appellees. We cannot take judicial notice of the rules of practice adopted by the lower courts. In the absence of any rule prescribing the time within which an application for a change of venue must be made, we must be governed by the statute, and by the statute the appellant was entitled to a change of venue. *Galloway v. The State*, 29 Ind. 442.

The judgment rendered by the court is erroneous. There were instalments not due at the time of the rendition of the same. The court ordered that the lands mortgaged should be sold in parcels, as might be directed by the plaintiffs. The question as to the susceptibility of mortgaged premises to division can only arise for the decision of the court where, in a proceeding for foreclosure, it becomes necessary for the court to render judgment for the collection of instalments, of which some are due and some are not due, and if susceptible of division, the particular division should be determined by the court, and made a part of the decree. Sec. 638 of the code, 2 G. & H. 296; *Brugh v. Darst*, 16 Ind. 79; *Denny v. Graeter*, 20 Ind. 20; *Peck v. Hensley*, 21 Ind. 344; *Wilcoxson v. Annesley*, 23 Ind. 285; *Cassel v. Cassel*, 26 Ind. 90.

The decree in this case cannot be supported either on principle or by authority. To give to the plaintiff the power to direct the order in which the several parcels should be sold, might result in great injustice and oppression. It is the duty of the court to hear the proof and, if the lands are found to be susceptible of division, to determine the particular division, and make this a part of the decree, for the direction and guidance of the sheriff. If the parcel first

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offered should fail to sell for enough, the sheriff should then offer another, and so continue until enough has been sold to satisfy the instalment or instalments due.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to grant a new trial, and for further proceedings in accordance with this opinion.

G. Durbin, for appellant.

W. D. Ward, J. O. Cravens, and J. B. Reback, for appellees.

COCHRAN v. UTT.

MORTGAGE.—Description of Land.—A mortgage was executed to the State on “all the west half of the north-west quarter of section 8, township 6, range 7,” without stating in what county or state the land is situated or at what particular land-office it was subject to entry.

Held, that the mortgage, for the want of more certainty as to the land intended to be mortgaged, vested no interest in the State in any particular land; therefore, a sale by the auditor under the mortgage was a nullity and vested no title in the purchaser.

APPEAL from the Jennings Circuit Court.

WORDEN, J.—This was an action by the appellant against the appellee, to recover the possession of the following real estate, viz.: The west half of the north-west quarter of section number eight, in township number six, north of range number seven east, situate in said county of Jennings. Issue, trial by the court, finding and judgment for the defendant as to all of the land except “six rods square” in the north-west corner of the tract, as to which there was a finding and judgment for the plaintiff. The plaintiff moved for a new trial, but his motion was overruled, and he excepted. The case comes before us on the evidence; and, although several questions are made by the appellant, we deem it unnecessary

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to notice more than one point, inasmuch as that is fatal to the defendant's supposed title to the property.

The case made by the evidence is the following:

The land was patented to Adam Youtsey, in 1839. In 1840, Youtsey conveyed it to Joseph Reed, who, in 1852, conveyed it to the appellant, George W. Cochran. Hence the appellant has a perfect title, unless the title of the appellee, hereinafter stated, shall be deemed valid.

On January 3d, 1847, Joseph Reed borrowed of the school funds of Jennings county one hundred dollars, and to secure the payment thereof, executed a mortgage as follows:

"I, Joseph Reed, of the county of Jennings and State of Indiana, do assign over and transfer to the State of Indiana, all the west half of the north-west quarter of section eight, town six, range seven, excepting six rods square from the north-west corner heretofore deeded for a school-house for the use of township number seven, range nine; which I declare to be mortgaged for the payment of one hundred dollars, with interest at the rate of seven per cent. per annum, payable annually in advance, according to the conditions of the note hereunto annexed. In testimony," etc.

It will be observed that the mortgage does not specify whether the land intended to be mortgaged lies in the county of Jennings, or even in the State of Indiana, nor does it specify it as land subject to entry at any particular land-office. "Town 6" may be either north or south of the base line, and "range 7" may be either east or west of the principal meridian. A glance at the map of the State delineating the congressional township boundaries shows that there are three townships in the State, to say nothing of other states, that are equally indicated by the description in the mortgage. Township six, north (of the base line) of range seven east (of the principal meridian), is in Jennings county. Township six, north of range seven west, is in Green county. So, also, township six, south of range seven west, lies in Spencer and Warrick counties. The failure to designate whether the township intended was north or south, or whether the range

was east or west, in the absence of any other statement from which it could be inferred, leaves it altogether uncertain which of the three townships was intended, assuming that the land intended lies in Indiana. If the land intended lies in any other state, there are doubtless many townships that are equally indicated by the description in the mortgage.

The defendant claimed title by virtue of a sale made of the land in controversy, by the auditor of Jennings county, by virtue of the mortgage, to John B. Fable, who conveyed to the defendant.

We are of opinion that the mortgage, by reason of its want of a sufficiently certain description of the land intended to be mortgaged, vested no right or title in the State to any particular land, and hence that the sale by the auditor was void and vested no title in the purchaser. *Munger v. Green*, 20 Ind. 38, and cases there cited; *Peck v. Mallams*, 10 N. Y. 509.

We are not favored with any brief for the appellee, and are not, therefore, advised upon what ground it was claimed or held that the mortgage was sufficient.

It is probable that the mortgage might have been, on proper proceedings for that purpose by the auditor, reformed and made to express the intention of the parties by describing the land intended to be mortgaged.

Perhaps the purchaser of the land from the auditor might have had a reformation, so as to enable him to hold a lien on the land for the amount intended to be secured by the mortgage, and perhaps also the appellee can do the same thing. These propositions, however, are not before us, and nothing is decided in reference to them.

What we decide is, that the mortgage, for the want of more certainty as to the land intended to be mortgaged, vested no interest in the State in any particular land, and, therefore, that the sale by the auditor was a nullity and vested no title in the purchaser, Fable, and that Fable conveyed no title to the defendant. For this reason the judgment below for the defendant must be reversed.

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The judgment below in favor of the defendant and against the plaintiff is reversed, with costs, and the cause remanded for a new trial.

H. W. Harrington, for appellant.

PICKENS *v.* HOBBS ET AL.

PRACTICE.—*Juror not a Householder.*—Where a motion for a new trial has been made on the ground that one of the jurors was not a householder, and that the party making the motion accepted him in ignorance of that fact, and the court has overruled the motion, the ruling will be sustained on appeal, if in the affidavits on the point the preponderance of testimony sustains the ruling.

SAME.—*Conflict of Testimony.*—This court will not determine the preponderance of testimony in cases of conflict thereof.

APPEAL from the Orange Circuit Court.

BUSKIRK, J.—This case is the same as the case of *Fisher v. Hobbs*, *post*, p. 276, with the exceptions hereinafter stated.

In the present case no question is made upon the giving or refusing to give instructions to the jury.

Counsel for appellant insist that the court erred in overruling the motion for a new trial upon two grounds. The first is, that one of the jurors who tried the cause was not a householder, and that the appellant accepted him in ignorance of the fact.

The contest of affidavits upon the competency of the juror in question stands as follows :

Two of the attorneys for appellant swore that they had no knowledge or information that William F. Osborn, the juror in question, was not a householder, until after the jury had

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returned their verdict. One person testified that Osborn was a married man, but boarded with and clerked for his father-in-law, Hugh Wilkins.

Three persons filed affidavits on behalf of the appellees, in which they stated that they were well and intimately acquainted with Osborn; that he was a married man and clerk of the West Baden hotel, and that he and his family had furnished and occupied a portion of said house separate and distinct from that occupied by Hugh Wilkins, and that they knew that he was a householder of said county.

It seems to us that the preponderance of the testimony was in favor of the competency of the juror.

It is next insisted that the verdict of the jury was contrary to the evidence. There were fourteen witnesses who testified on behalf of the appellant, and placed the damages of the appellant at sums ranging from one hundred and fifty to three hundred and fifty dollars.

There were twenty witnesses who testified on behalf of the appellees. Some of them testified that appellant would not sustain any damage, some that he would be benefited, and others that the value of his farm would be increased from one to three hundred dollars.

It is quite obvious that we could not undertake to reconcile the testimony and determine whether the jury decided rightly, in finding that the appellant would not be damaged by the proposed road.

The judgment is affirmed, with costs.

F. Wilson and *A. C. Voris*, for appellant.

A. J. Simpson, for appellees.

Burnett *et al.* v. Curry.

BURNETT ET AL. v. CURRY.

PRACTICE.—*Appeal. — Judgment by Agreement. — Supplemental Pleading.*—

Where, upon appeal, it was agreed, that if the instructions of the court below had been erroneous as applied to the evidence, the Supreme Court should render a proper judgment without a new trial, and this court thereupon fixed the basis of a judgment and directed the court below to render such a judgment, a party to the agreement could not, when the case was remanded, file a supplemental answer alleging partial payment upon execution issued pending the appeal; all the lower court could do was to enter the judgment as directed.

APPEAL from the Knox Circuit Court.

DOWNEY, J.—This action was brought by Curry against Stephen Burnett, Stephen S. Burnett, William Burtch, and George W. Patrick. Its history, down to the point at which it is alleged the error now complained of was committed, may be found in the opinion of this court, in 36 Ind. 102. It will there be found that, when the case was then here, it was agreed that this court should render judgment in accordance with the law, as applied to the evidence, without a new trial, if in its opinion the instructions of the court below did not correctly state the law as applied to the evidence. This court, finding that the instructions in question were incorrect, fixed the basis upon which the judgment should be rendered, and remanded the cause to the circuit court, with instructions to render the judgment accordingly. In that court, after the opinion of this court was entered, Stephen Burnett and Stephen S. Burnett offered to file a supplemental answer, stating that after the rendition of the judgment in favor of their co-defendant Burtch and said Curry, of August 24th, 1869, to wit, on the 16th day of March, 1870, Burtch procured execution to be issued on said judgment in his behalf and delivered to the sheriff, that before the stay of execution, while the judgment was in full force, etc., on the 18th day of April, 1870, they paid to the sheriff the sum of seven hundred and ninety-six dollars, and as to the residue of the amount due on said notes, they offered to confess

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judgment. The court refused to allow the answer to be filed; the appellants excepted and have assigned the ruling as error.

We are of the opinion that the ruling of the circuit court was proper. The parties had agreed that in the event of the reversal of the case in this court, this court should render such judgment as the law, taken in connection with the facts, required. This we did, in effect, by fixing the basis on which the judgment should be rendered, and instructing the circuit court to render the judgment accordingly. That court had but one duty to perform, which was to render judgment as directed. It was, in effect, the rendition of judgment by this court. Curry had no occasion to have a *supersedeas* or stay of execution pending the appeal, when the case was here before. There was no judgment on which an execution could issue against him. If the appellants were interested in a stay of execution, they should have obtained it. The judgment in favor of Burtch having been reversed, it is probable that he will be liable to the appellants for the money collected upon it, or such part of it as they ought to recover from him. But this is not a question in this case. *Sed vide Glover v. Foote*, 7 Blackf. 293.

The judgment is affirmed, with costs and five per cent. damages.

W. F. Pidgeon, for appellants.

J. C. Denny, *G. G. Reily*, and *W. C. Johnson*, for appellee.

KIPHART ET AL. v. THE STATE.

CRIMINAL LAW.—Riot.—Unlawful Act.—Where an offence consists in three or more persons doing an act in a violent and tumultuous manner, it is not necessary, in order to sustain a prosecution for such an offence, that the act done should be unlawful. Although the word violent be not used in the

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affidavit or information, in describing the offence, if the allegations show that the act was done violently, it will be sufficient.

SAME.—Practice.—Bill of Exceptions.—Bills of exceptions in a criminal action must be filed within the term, and the record must show the fact of the filing and the time thereof.

APPEAL from the Morgan Common Pleas.

OSBORN, C. J.—The appellants were prosecuted, tried by a jury, and convicted of a riot, in the Morgan Common Pleas.

The defendants moved the court to quash the information, which was overruled, and they excepted. A motion for a new trial was made and overruled, to which the defendants excepted, and judgment was rendered on the verdict.

The errors assigned are, 1st. In overruling the motion to quash the information. 2d. In overruling the motion for a new trial.

The affidavit and information both state that the defendants on the 6th day of July, 1872, in Morgan county, and State of Indiana, did do an unlawful act, by then and there in a riotous and tumultuous manner, with stones and brick-bats, in a rude, insolent, and angry manner touching, striking, and beating Frederick Gerholt, and by then and there, in a riotous and tumultuous manner, threatening to use violence on the person of Peter Long and Frederick Gerholt, then and there being.

The objections urged against the affidavit and information are, "that they contain no proper charge of an assault and battery, which constitute the gravamen of the offence charged, in this, that they do not in statutory words or those equivalent thereto, nor at all, charge the striking and beating to have been done unlawfully;" and "when a particular offence is charged, which contains and embodies within it a minor offence which is necessary to it, and upon which it depends, that minor offence must be charged according to its statutory definition, or the indictment or information must fall;" and we are referred to *Adell v. The State*, 34 Ind. 543.

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We do not think the case cited applicable to this. That was an indictment for an assault and battery with intent to commit a felony. The essence of the offence was the assault and battery, and the felonious intent only aggravated and converted it into a felony. In the case at bar, the offence consists in three or more persons doing "an act in a violent and tumultuous manner." The statute does not require that the act done shall be an unlawful one. Where three or more persons do any act in a violent and tumultuous manner, it is a riot. 2 G. & H. 458, sec. 4; *The State v. Dillard*, 5 Blackf. 365; *The State v. Voshall*, 4 Ind. 589. The allegations show that the acts were done violently, although the word violent is not used. The allegation, that the act done was an unlawful one, will not vitiate the affidavit or information. It was not descriptive of the offence.

The record shows that the motion for a new trial was overruled and the judgment rendered on the last day of the term, and that sixty days were given within which to file a bill of exceptions. Bills of exceptions in criminal prosecutions must be filed during the term. 2 G. & H. 420, sec. 120. The record in this case fails to show that it has been filed at all. It should show affirmatively that it was filed, and when. *Peck v. Vankirk*, 15 Ind. 159. The clerk has copied what purports to be a bill of exceptions; but as it is not properly in the record, we cannot consider it. Hence, no question arises on the motion for a new trial, and the judgment is affirmed.

The judgment is affirmed, with costs.

C. F. McNutt and *G. W. Grubbs*, for appellants.

J. C. Denny, Attorney General, for the State.

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FISHER v. HOBBS ET AL.

HIGHWAY.—Claim for Damages.—Waiver.—Where, upon a petition being filed for the location and opening of a proposed highway, a remonstrant over whose lands it would pass appeared in the commissioners' court, and made no objection to the sufficiency of the petition, the giving of notice, or as to the utility of the proposed highway, but filed his claim for damages;

Held, that he waived all questions of irregularity in the proceedings and as to the utility of the road.

EVIDENCE OF 'USE BY PUBLIC.—Instruction.—In determining whether a proposed road will be of benefit or injury to a particular farm, it is proper for the jury to consider the existence or non-existence of the roads that pass over or near the farm; and the legality and permanency of such roads are of vital importance. Accordingly, it was error for the court to refuse to instruct the jury, that by the unopposed use of any road over the lands of the remonstrant by the public, he being cognizant thereof, until public accommodation and private rights would be materially affected by the interruption of the same, although the use had not continued twenty years, he would be barred of his right to close the highway.

APPEAL from the Orange Circuit Court.

BUSKIRK, J.—William P. Hobbs and forty-seven others, citizens and freeholders of Orange county, filed a petition before the board of commissioners of said county, for the creation of a highway. Viewers were appointed, who reported that the proposed highway would be of public utility. Thereupon the appellant filed a remonstrance against the establishment of the proposed highway, upon the ground that it would pass over, through, and across his lands, and would result in great injury to him, and claimed damages in the sum of one thousand dollars.

The board appointed reviewers, who reported that the appellant would be damaged in the sum of one hundred and seventy-five dollars. The board then ordered the road to be opened, and that said sum of one hundred and seventy-five dollars be paid to the appellant. From this order the appellant appealed to the circuit court, where the cause was tried by a jury, who found that the appellant was not entitled to any damages. The court overruled a motion for a new

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trial and rendered judgment on the verdict, from which the appellant appealed to this court.

The appellant has assigned for error the overruling of his motion for a new trial.

The first reason assigned for a new trial was, that the verdict was not sustained by sufficient evidence. The defects pointed out were, that there was no evidence showing the filing of the petition, the giving of notice, that the petitioners were freeholders, or the appointment of viewers.

The second reason assigned for a new trial was, that the court excluded from the jury all evidence offered by the appellant as to whether the road was of public utility.

The third reason assigned for a new trial was, that the court instructed the jury that they had nothing to do with the question as to whether the road was, or was not, of public utility.

We are of opinion that the court committed no error in overruling the motion for a new trial, for the reasons above stated. The only question involved in the case, and upon which the jury had to pass, was whether the appellant would be damaged by the location of the road, and if damaged, in what amount. The appellant appeared in the commissioners' court and made no objection to the sufficiency of the petition, the giving of notice, or as to the utility of the proposed highway, but filed his claim for damages. By so doing, he waived all questions of irregularity in the proceedings and as to the utility of the road. The case of *Smith v. Alexander*, 24 Ind. 454, is much in point, and is decisive of the questions sought to be raised by appellant. The court in that case says: "The record shows that at the time the petition was presented, Smith and others of the appellants appeared and objected to the proceedings on other grounds, but made no objection to the sufficiency of the notice; and when the first viewers reported in favor of the highway, all the remonstrants, except Cole, appeared and filed their claims for damages. They did not object to the sufficiency of the notice, nor that the proposed highway was not of public

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utility; they simply claimed damages because of its location on their lands. We deem it proper here to say that, under the statute, it is clear that the reviewers had nothing to do with the question of the public utility of the highway; that fact was, in effect, admitted by the remonstrants failing to deny it, and claiming damages.

"The only question, therefore, submitted to the reviewers, was the amount of damages, if any, the remonstrants would sustain by reason of the location of the road through their lands. This, in effect, was the issue, and was the only question to be tried, on appeal, in the circuit court. The remonstrants might also have put in issue the public utility of the highway, but they did not, and it was therefore admitted."

To the same effect is the case of *Cummins v. Shields*, 34 Ind. 154.

The next reason assigned for a new trial is based upon the refusal of the court to give to the jury the first, second, third, fourth, seventh, ninth, eleventh, and thirteenth instructions, as asked by the appellant. The first, second, third, fourth, and seventh instructions asked by the appellant and refused by the court related to irregularities in the proceedings and the question of the public utility of the road, and were, for the reasons already given, correctly refused. If there was any error in refusing to give the eleventh, it was cured by giving the twelfth instruction, which fully covered the ground assumed in the one refused. We do not think the thirteenth instruction, whether given or refused, could materially affect the case. Counsel for appellant discuss the refusal to give other instructions, but the attention of the court below was not called to them in the motion for a new trial, and error cannot be based upon such refusal. This leaves for our consideration the refusal to give the ninth instruction, which is as follows:

"9th. In determining the question whether the farm of John Fisher has (without the proposed road) any roads, either public or private, leading to and from it, you should apply the following principles of law: That the unopposed use

by the public, of a road over the land of an individual who is cognizant of the fact, for a period of twenty years, would give the public an absolute right against such individual to have such road kept open for the use of the public. And if such use should be shown to have been continued until public accommodation and private rights would be materially affected by the interruption of the same, although not for a period of twenty years, in such case, the owner of the lands over which such road would pass would not have the right to shut up such road. So that, if the proof satisfies you that any of the roads or outlets of which the witnesses have spoken, leading to and from the farm of Fisher, have been used by the public as a highway without interruption for a period of twenty years, or until public accommodation and private rights would be materially affected by closing them up, then, in that case, you are instructed that such roads or outlets could not be closed by the owners of the lands over which the same pass."

Public highways may be established in this State, first, by order of the board of commissioners of the county; secondly, by express grants; thirdly, by dedication, arising by presumption from a continued use of the place for a considerable period of time by the public as a public highway, with a knowledge thereof by the owner, and without objection on his part. *Holcraft v. King*, 25 Ind. 352.

The following language was used by this court, in *The State v. Hill*, 10 Ind. 219:

"The instruction given is evidently based upon section forty-five of an act relative to the opening, etc., of highways, which declares that 'all public highways which have been, or may hereafter be, used as such for twenty years or more, shall be deemed public highways.' 1 R. S. p. 315. But we have given a construction to that section which does not favor the ruling of the common pleas. In *Hays v. The State*, 8 Ind. 425, it was held that that statute, though it make twenty years user an absolute bar, does not impair the right of the public to insist upon a dedication, in accordance with

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the common law rule. And under that rule, it has been decided that the unopposed user of a highway by the public, over the land of an individual who is cognizant of the fact, for a much less period than twenty years, say four or five years, was sufficient to raise the presumption of a dedication. Indeed, the weight of authority seems to be, that the use of land for a highway for such a length of time that public accommodation and private rights might be materially affected by an interruption of the enjoyment, would be evidence that the owner intended a dedication to the public. *Jarvis v. Dean*, 3 Bing. 447; 2 Greenl. Ev., sec. 662.

"The statute upon which this prosecution is founded, does not require that the highway obstructed should have been established by competent authority. And if, in this instance, it had been used, travelled and worked on, uninterruptedly for ten, or even a less number of years, the jury had the right to infer a dedication by the owner of the land over which the highway passed, and, consequently, to find that the defendant had no right to obstruct it. It follows that the instruction of the court is erroneous, and the one refused should have been given."

The existence or non-existence of other roads, that passed over or near to the farm of the appellant, was an important and material element to be considered by the jury, in determining whether the proposed road would benefit or injure the appellant, and the legality and permanency of such roads were of vital importance.

In our opinion the ninth instruction contained a correct enunciation of the law as applicable to the case, and the court erred in refusing to give such instruction; and for this error the judgment must be reversed. The jury were no where told that a user for less than twenty years would amount to a dedication.

The judgment is reversed with costs; and the cause is remanded for a new trial.

J. Cox, F. Wilson, and A. C. Veris, for appellant.

A. J. Simpson, for appellees.

STOCKTON ET AL. v. COLEMAN ET AL.

PRACTICE.—Cause Reversed on Appeal.—Time of New Trial.—Statute Continued in Force.—This provision in the statutes of 1843 is continued in force by sec. 802, p. 336, 2 G. & H.: “Whenever any cause is reversed in the Supreme Court, in whole or in part, on appeal or writ of error, and sent back for such further proceedings as may require a trial by jury, if the decision and opinion of the Supreme Court in such cause shall have been deposited in the office of the clerk of the inferior court sixty days or more before the first day of any term of such court, such cause shall stand for trial at such term; otherwise it shall be continued until the next term of the court.”

APPEAL from the Tippecanoe Common Pleas.

DOWNEY, J.—When a judgment has been reversed in this court, and the cause remanded for a new trial, at what time is the new trial to take place? The answer to this question will dispose of the only point involved in this case.

The appellees sued the appellants, in the common pleas court of Tippecanoe county, on three several promissory notes. The case was tried at the February term, 1870, of said court, and judgment rendered for the appellees, for six thousand seven hundred and eleven dollars and fifty cents. The appellants brought the case to this court on appeal, and the Supreme Court on the 28th day of May, 1872, rendered their opinion reversing the judgment. On the 13th day of June, 1872, the appellees, Coleman and Rainy, filed in writing with the clerk of the Supreme Court a waiver of a petition for rehearing in accordance with the following rule of the Supreme Court. “Rule 25. Opinions and judgments shall not be certified to the court below by the clerk of this court, except in criminal cases, until the expiration of sixty days, unless by order of this court, or on the filing of a waiver of a petition for rehearing, which order of the court, or filing of waiver, shall be certified by the clerk, with the opinion.”

On the 15th day of June, 1872, the opinion of the Supreme Court, accompanied with the waiver of filing petition for rehearing by Coleman and Rainy, and duly certified by the

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clerk of the Supreme Court, was filed in the court of common pleas of Tippecanoe county, which court was then, and had been in session since the 3d day of June, 1872 ; and, on the 17th day of June, the opinion was spread of record ; and, on the 19th day of June, 1872, appellants' attorneys entered a special appearance and moved the court to continue the case until the next term of the court. This motion was by the court overruled, and appellants excepted.

Trial was afterward had, and judgment for seven thousand one hundred and eighty-eight dollars rendered, under issues made in conformity with the opinion of the Supreme Court.

The appellants moved for a new trial, and in arrest of judgment, each of which motions was overruled, and appellants excepted.

No question arises in the present record involving the merits of the case.

The only question presented is one of practice, and arises upon the action of the court in overruling appellants' motion to continue the cause to the next term of the court by operation of law.

The civil code of 1852 has these sections relating to the question involved :

"Sec. 570. When the judgment is reversed, in whole or in part, the supreme court shall remand the cause to the court below, with instructions for a new trial, when the justice of the case requires it; but if no new trial is required, with particular instructions relative to the judgment to be rendered, and all modifications thereof.

"Sec. 571. When any cause is determined in the Supreme Court, the clerk shall forthwith notify the clerk of the court below that it is determined, and whether reversed or affirmed, in whole or in part, or dismissed; at any time within sixty days after such determination, either party may file a petition for a rehearing; if not so filed, the decision and instructions of the Supreme Court shall be certified to the court below, unless otherwise ordered by the court." 2 G. & H. 276.

It is also provided, in sec. 315, p. 194, 2 G. & H., that

“every action shall stand for issue and trial at the first term after it is commenced, when the summons has been served on the defendant ten days, or publication has been made for thirty days before the first day of the term.”

In *Williams v. Port*, 9 Ind. 551, which, contrary to what is supposed by counsel for appellee, was decided under the code of 1852, this court said: “When reversed and remanded, the cause stood upon the docket of the lower court for trial again at the next term, provided it was filed in time. If not filed in time, it stood continued by operation of law.”

In *Williams v. Jones*, 14 Ind. 363, this court said: “The opinion reversing the judgment was not filed in the court below sixty days before the first day of the term at which the cause was again called up for trial; and it was objected that the fact just stated precluded a trial at the then term. By the code of 1852, notice of the decision of a cause in the Supreme Court is immediately sent to the court below; and, if no petition for rehearing prevent, at the expiration of sixty days thereafter, a copy of the decision is transmitted, accompanied by such instructions as the Supreme Court may give. If a new trial is ordered, it must take place as soon as the court and parties are ready for it. The parties must be taken to be ready, unless they (or one of them) show legal cause for delay. The code is silent on the question of time of trial, further than that the cause must be remanded for further proceedings.”

It being true that “the code is silent on the question of time of trial,” it is insisted by counsel for the appellant that the enactment on the subject in the statute of 1843 is in force. It is provided, in sec. 802, p. 336, 2 G. & H., that “the laws and usages of this State relative to pleadings and practice in civil actions and proceedings, not inconsistent herewith, and as far as the same may operate in aid hereof, or to supply any omitted case, are hereby continued in force.” The provision in the statute of 1843 is not inconsistent with any provision in the code on the subject, for there is no provision covering the point. The section in the statute of

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1843, p. 732, is as follows; "Whenever any cause is reversed in the Supreme Court, in whole or in part, on appeal or writ of error, and sent back for such further proceedings as may require a trial by jury, if the decision and opinion of the Supreme Court in such cause shall have been deposited in the office of the clerk of the inferior court sixty days or more before the first day of any term of such court, such cause shall stand for trial at such term;" otherwise it shall be continued until the next term of the court."

It is very inconvenient to have no certain rule on this subject. It is according to the spirit of our laws to give parties a reasonable time in which to prepare for the trial of causes. Hence the section of the code above quoted requiring the process to be served ten days, or publication made thirty days before the first day of the term, to justify any steps in the cause at such term. It is a hardship to a party to be required to be on the lookout during the whole of a term of the court lest the other party should try the cause in his absence. We see no reason why the section quoted from the statute of 1843 should not be regarded as in force to supply this omitted case. This section in the statute of 1843, and the provision in the code continuing it in force, seem not to have been suggested to the court in the cases to which we have referred, or doubtless the question would have been then disposed of on these grounds.

The judgment is reversed, with costs, and the case remanded, with instructions to grant a new trial and to proceed in accordance with this opinion.

J. A. Stein, J. R. Coffroth, and T. B. Ward, for appellants.

W. C. Wilson and J. H. Adams, for appellees.

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HAYS v. MCCONNELL.

CONTRACT.—Implied Promise.—Work and Labor.—Uncle and Niece.—A girl, upon the death of her mother, was turned away from home by her father, at the age of fourteen, and at the suggestion of her aunt and her grandmother she went to live with an uncle and aunt, with whom she remained until she was twenty-five years of age; when, being engaged to be married, she privately left, and was afterward married; and she subsequently brought suit against said uncle for work and labor. It was not claimed that any express contract existed, and it appeared that she was kindly treated and provided for in a better manner than she would have been if she had merely received ordinary wages.

Held, that she was not entitled to recover for her services.

APPEAL from the Dearborn Circuit Court.

DOWNEY, J.—This was an action by the appellee against the appellant, on an account for work and labor extending from December, 1859, to December, 1868, amounting to two thousand two hundred and eighty-eight dollars, with a credit of two hundred dollars, leaving due two thousand and eighty-eight dollars. The action was commenced in March, 1870. The defendant answered: 1st. The general denial; 2d. Payment; and 3rd. Set-off. Reply in denial of the second and third paragraphs of the answer. The issues were tried by a jury; there was a verdict for the plaintiff for four hundred and fifty dollars, a motion for a new trial by the defendant, because the verdict was not sustained by the evidence, overruled, and judgment for the amount of the verdict. The evidence is in the record by a bill of exceptions. The error assigned is the refusal to grant a new trial. The case turns upon the question, whether or not, under the circumstances, the jury should have found the existence of a promise by the appellant to pay for the services rendered by the appellee. It is not always the case, where one person has rendered services for another, that the law will imply a promise to pay for the services. Where services are rendered by a child to its parent, after the arrival of the child at twenty-one years of age, and while it continues to reside with its parent, without any agreement on the part of the parent to pay for such services, the law implies no obli-

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gation on the part of the parent to pay for such services. *Resor v. Johnson*, 1 Ind. 100; *Adams v. Adams' Adm'r*, 23 Ind. 50; *Candor's Appeal*, 5 Watts & S. 513; *Guild v. Guild*, 15 Pick. 129; *Andrus v. Foster*, 17 Vt. 556.

The rule is not confined to the cases where the relation of parent and child exists. It extends to other relations, and perhaps relationship is only a circumstance tending to rebut the implication of a promise. In *Oxford v. McFarland*, 3 Ind. 156, the rule was applied where the relationship of father-in-law and son-in-law existed between the parties. In *Weir v. Weir's Adm'r*, 3 B. Mon. 645, it was held to apply where the relation of uncle and nephew existed between the parties. In this case the uncle was an Irishman, who had emigrated to this country at an early day, and had amassed a handsome fortune, and lived and died a bachelor. His three nephews emigrated to this country some years before the death of their uncle, without property or means, and were taken into his employ, fed, clothed, and supplied by him. They, in the mean time, were actively engaged in assisting him in carrying on his business, and rendered essential and valuable services in their several stations, one of them for some twenty years before his death, the other two for six or eight years. No contract for hire or stipulation for wages appeared, nor was it shown by any evidence that they looked for or expected compensation in the form of wages or salaries. They inherited the real estate of their uncle in connection with a daughter of a deceased brother of theirs, and were in addition entitled to share with the non-resident heirs in the distribution of the personal estate. But not content with this, they set up a claim against the administrator of their deceased uncle's estate, for pay for their services during the time they lived with him. The court in deciding the case said: "It is not pretended in this case, that any express contract for services was ever made. If a right to an allowance for services exists, it must rest only on an implied contract or promise to pay. It is said by one learned jurist, 'that an implied contract or promise is inferred from

the conduct, situation or mutual relations of the parties, and is enforced by the law on the ground of justice.' And this language is used by Chief Justice MARSHALL in 12 Wheaton, 341: 'a great mass of human transactions depends upon implied contracts; upon contracts which are not written, but which grow out of the acts of the parties. In such cases, the parties are supposed to have made those stipulations which, as honest, fair and just men, they ought to have made.' And Lord MANSFIELD says, that when *ex equo* and *bono* money is due, though there be no express promise to pay, that the law will imply a promise. Testing the defendant's claim for compensation by the rules and principles just cited, and it is hard to perceive any just ground upon which they can be made to rest. From the conduct, situation and mutual relations of the parties, so far from its being founded in justice, to allow compensation, it would operate the height of injustice; and so far from the stipulations for payment, which is sought to be implied, being such as honest, fair and just men ought to have made, they are precisely such as honest, fair and just men, under the circumstances of this case, would not have thought of exacting on the one side, or have thought of making on the other," etc. And see *Wilcox v. Wilcox*, 48 Barb. 327; *Amey's Appeal*, 49 Pa. St. 126; *Bundy v. Hyde*, 50 N. H. 116, and cases there cited.

In further illustration of the legal principle to which we refer, we may cite the cases of *Cauble v. Ryman*, 26 Ind. 207; and *King's Adm'r v. Kelly*, 28 Ind. 89, where it was held, that when a mother-in-law lived in the family of her son-in law, without any contract for payment of board, nothing could be recovered. In the first named case the court said: "It is a rule of law, recognized by repeated decisions of this court, that where persons standing in the relation toward each other occupied by the plaintiff and the deceased in this case, live together as members of a common family, there is no obligation to pay for services rendered on the one hand, or for board, etc., furnished on the other, without there

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be an express promise to pay, or the circumstances be such as to raise an implied promise."

In the case under consideration, the evidence tends to show that after the death of the mother of the appellee, she was turned away from home by her father, and at the suggestion of her aunt and grandmother, went to live in the family of the appellant, who and whose wife were her uncle and aunt. She was at this time only fourteen or fifteen years of age. She remained until she was twenty-five or twenty-six years of age, when being engaged to be married, she privately left, and was afterward married. She was a witness in the trial of the case, and did not testify to the existence of any contract or agreement by which she was to have wages. The testimony of the other witnesses tends very strongly to show an understanding that she was not working for wages. She appears to have labored industriously, and to have been kindly treated by the appellant and his family, and provided for in a much better manner, as it seems to us, than she could have been had she received ordinary wages. No accounts seem to have been kept by her against the appellant for her services, nor was there any demand for pay, nor does it appear that they ever had any settlement relating to her services or as to what she received from the appellant, or that any settlement was demanded by her. Without further stating the evidence, all of which we have carefully read, we are of the opinion that the verdict of the jury was not sustained by the evidence. We think the case comes clearly within the principle of law to which we have alluded, and which is enunciated in the decisions to which we have referred.

We are aware of the rule recognized in the cases of *Dallas v. Hollingsworth*, 3 Ind. 537; *Wheatly v. Miscal*, 5 Ind. 142; *Van Pelt v. Corwine*, 6 Ind. 363; and *Garner's Adm'r v. Board*, 27 Ind. 323, where it is held that an infant is not bound by a special contract to perform labor for a definite time, but may avoid the contract and recover for the value of the services rendered. These cases do not affect the case under

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consideration. The evidence was abundant to show a ratification of the contract or arrangement under which the appellee was living with the appellant, after she became twenty-one years of age. The contract was only voidable, and the appellee not having avoided it on her arrival at majority, but having very clearly ratified it by continuing to live with the appellant upon the same terms, the question of her infancy, for the first few years of the time during which she lived with appellant, cannot affect the case. But if there was no ratification, and the case was one between an infant and an adult, still there must be such facts as to justify the implication of a promise to pay, when there has been no express promise.

The judgment is reversed with costs, and the cause remanded, with instructions to the circuit court to grant a new trial.

D. S. Major, O. B. Liddell, and J. Schwartz, for appellant.
J. D. Haynes and J. K. Thompson, for appellee.

COLEMAN v. LYMAN.

CONVEYANCE.—Statutory Form.—Covenants.—A warranty deed in the statutory form is a conveyance in fee simple to the grantee, his heirs, and assigns, with covenants from the grantor and his heirs and personal representatives, that he is lawfully seized of the premises, has good right to convey the same, and guarantees the quiet possession thereof, that the same are free from all incumbrances, and that he will warrant and defend the title against all lawful claims.

SAME.—Breach of Covenant of Seisin.—Action not Local.—A., the grantee in a deed of conveyance of certain real estate from B., brought suit against C., who had conveyed the land to B., for breach of a covenant of seisin in his deed to B.

Held, that the action was not local; that the suit was one to be brought, not in the county where the land was situated, but in the county where C. resided.

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SAME.—*Covenant Running with Land.*—The covenant of seizin will pass to the heir or assignee of the grantee. Whoever derives the right to the land through such grantee, and ultimately sustains damages in consequence of the covenantor's want of title, may sue him for damages.

SAME.—*Consideration.*—The defendant in such an action may show a want or failure of consideration for the deed upon which the action is brought.

APPEAL from the Tippecanoe Circuit Court.

DOWNEY, J.—This action was brought by the appellee against the appellant. On the 14th day of October, 1857, the appellant and his wife conveyed, by warranty deed, in the statutory form, to William A. White, certain real estate in Benton county, Indiana. On the same day the said White conveyed, by a similar deed, a part of the same lands to the appellee. This action is for a breach of the covenant of seizin in the deed of Coleman to White, brought by Lyman, the grantee of White. By virtue of the statute the deeds in question are deemed and held to be conveyances in fee simple to the grantee, his heirs, and assigns, with covenant from the grantor and his heirs and personal representatives, that he is lawfully seized of the premises, has good right to convey the same, and guarantees the quiet possession thereof, that the same are free from all incumbrances, and that he will warrant and defend the title to the same against all lawful claims. 1 G. & H. 260, sec. 12.

There were issues of law and fact found and disposed of, and final judgment rendered for the appellee.

There are three questions presented and discussed with great learning and ability.

It is insisted that the circuit court of Tippecanoe county had no jurisdiction, because the lands conveyed lie in Benton county. This question is probably best settled by a reference to the statute: "Actions for the following causes must be commenced in the county in which the subject of the action, or some part thereof, is situated:

"*First.* For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property.

Second. For the partition of real property. *Third.* For the foreclosure of a mortgage of real property."

The next section relates to actions which must be commenced in the county where the cause or some part thereof arose. Section thirty relates to actions against a corporation, company, etc., having an office or agency in any county for the transaction of business, in which case any action growing out of the business of such office may be brought in such county. Section thirty-one relates to the place where an action to establish or set aside a will must be brought. Section thirty-two relates to the venue of actions against railroad, or canal corporations, or companies, or the owner of a line of stages or coaches, etc. Section thirty-three provides, that "in all other cases, the action shall be commenced in the county where the defendants or one of them has his usual place of residence." 2 G. & H. 56-58.

If it can be insisted, with any show of reason, that any of these sections required the action in question to be brought in the county where the lands are situated, it must be the first which we have quoted, and the first division of that section. But we think that section does not make the action in such case local. This was not an action "for the recovery of real property, or of an estate or interest therein;" nor do we think it was an action "for the determination in any form of such right or interest," within the contemplation of that section. Hence we are of the opinion that the objection made to the jurisdiction of the court is not well founded.

The next position taken by appellant is, that an action by the appellee cannot be maintained upon the covenant of seizin in the deed of the appellant to White. It is urged that if the appellant was not seized, there was a breach of the covenant as soon as it was made; that no title passed to White, and, consequently, that no title passed from him to the appellee, nor any right to sue for a breach of the covenant. This question is settled by the decision of this court in *Martin v. Baker*, 5 Blackf. 232. Unless we are to overrule that case, the question must remain settled. In

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the opinion in *Burnham v. Lasselle*, 35 Ind. 425, it was said : "Whatever the statute law may have been at the time the decision of *Martin v. Baker*, 5 Blackf. 232, was made, we think our present statute is decisive of the question ; but we do not admit that the two cases are precisely alike ; there, possession may have been given ; in this case it was not ; but if the two cases were the same, we would overrule that case." It is claimed that this language is virtually a decision overruling the case of *Martin v. Baker*. This is a misapprehension. All that was said in that opinion was, that if the two cases were the same, we would overrule that case. The case of *Burnham v. Lasselle* was a case where the breach occurred, and the entire damages accrued, in the lifetime of the grantee. In *Martin v. Baker*, "no special damage was alleged to have accrued to the intestate." The language of the court in that case is this : "It appears to us to be a mistake to say, that the covenant of seizin cannot pass to the heir or assignee of the grantee. The covenant is not inserted in the deed merely for the grantee's benefit, but for the benefit of all others who may derive their claim to the land through him. Whoever thus derives his right, and ultimately sustains damages in consequence of the covenantor's want of title, may sue him for the breach." This case has stood and been recognized as the law of the State on this point for more than thirty years, and we do not feel that we would be justified in overruling it without stronger reasons than are presented to us in this case. See the case of *Schofield v. The Iowa Homestead Company*, 32 Iowa, 317, which fully sustains our ruling in this case, after an examination of the cases.

The third question presented is this : can the defendant in such a case allege and show a want or failure of consideration for the deed in which the covenant is contained upon which the action is brought ? The circuit court held that he could not.

Following the ruling of this court in the case of *Gavin v. Buckles*, 41 Ind. 528, at the present term, we must hold that

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in this the circuit court committed an error. For this error the judgment must be reversed.

The judgment is reversed, with costs, and the cause remanded, for further proceedings in accordance with this opinion.

W. C. Wilson, J. H. Adams, Z. & S. P. Baird, S. A. Huff, and B. W. Langdon, for appellant.

W. D. Wallace, for appellee.

MANFORD ET AL. v. THE PLEASANT GROVE AND INDIAN
CREEK TURNPIKE COMPANY ET AL.

TURNPIKE.—*Assessment.*—Neither the board of equalization nor any court or body, except the assessors, has power to make any assessment of benefits in the construction of a turnpike.

APPEAL from the Switzerland Circuit Court.

OSBORN, C. J.—The main questions in this case were fully considered in *Hopkins v. The Greensburgh, Kingston, and Clarksburg Turnpike Co.*, 40 Ind. 44, and *The Greensburgh, Milford, and Hope Turnpike Co. v. Sidener*, 40 Ind. 424, and we do not think it necessary to reconsider them.

The appellees however insist, that, although lands liable to be assessed are omitted, the only remedy to the land-owner was by application for relief to the board of equalization, under sec. 3 of the act of May 14th, 1869, 3 Ind. Stat. 538, or by appeal under sec. 8 of that act. Those sections give no power to assess lands omitted. The board can equalize the assessment made. An appeal lies by a person aggrieved by an assessment. No power is given to any court or body, except the assessors, to make any assessment. The power to equalize an assessment made, or to correct it by appeal, is entirely different from the power to make one.

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The judgment of the said Switzerland Circuit Court is reversed, with costs. Cause remanded, with instructions to sustain the demurrer to the answer and for further proceedings.

DOWNEY, J., was absent.

H. W. Harrington, C. A. Korbly, and W. M. Smith, for appellants.

C. E. Walker and W. R. Johnston, for appellees.

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PRACTICE.—Demurrer to Evidence.—Statement of Evidence.—Joinder in Demurrer.—The party demurring to evidence should set out in full the evidence and demur thereto, and if the other party join in the demurrer, he admits that the evidence is properly set out. If the party offering the evidence denies the correctness of the statement thereof, he should refuse to join in the demurrer, and point out to the court the matters of omission or addition, and the court should require the demurring party to correctly state the evidence.

SAME.—Assessment of Damages.—Where there is a demurrer to evidence and a joinder therein, the court may have the damages assessed by the jury conditionally, or the jury may be discharged and a new jury called if the demurrer be overruled. The latter is the usual and the better practice.

SAME.—Judgment.—Exception.—Assignment of Error.—Pleadings.—Conclusions from Evidence.—If the demurrer be sustained, the judgment is like a final judgment on a successful demurrer to the complaint or answer. An exception to the ruling and an assignment of error thereon reserve the question; but defects in the pleadings cannot be taken advantage of to support the ruling, and the court will infer from the facts any conclusions the jury could reasonably have done.

SAME.—Motion for New Trial.—In Arrest.—If the demurrer be overruled and damages be assessed, a motion for a new trial may be made for error in such assessment, or in arrest of judgment for any defect in the pleadings sufficient in our practice to arrest judgment in other cases.

SAME.—Bill of Exceptions.—Where there is a demurrer to evidence, there is no bill of exceptions. Where a bill of exceptions is tendered, the evidence must go to the jury.

EXECUTION.—Growing Crop.—Lien.—Where an execution was issued upon

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| 42 | 294 |
| 138 | 577 |
| 42 | 294 |
| 138 | 577 |
| 42 | 294 |
| 140 | 525 |
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| 42 | 294 |
| 151 | 29 |
| 151 | 463 |

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a judgment on the 31st day of May, and, on the 25th day of the next July, the execution defendant sold his interest in a field of corn growing upon his lands, which had been planted and cultivated by tenants, and of which, by contracts with the tenants, he was to receive a portion when the corn matured in the field at cutting-up time, but each party was to save and take care of his own share; and the sheriff levied upon the interest of the execution defendant on the 4th day of August thereafter;

Held, that the corn was subject to execution and sale as the property of the execution defendant; that the execution was a lien thereon from the time it came into the hands of the sheriff, and the subsequent sale of the corn by the execution defendant in no manner impaired such lien.

SAME.—Return.—Additional Levy.—Where there has been a levy upon real property under several executions, the statement in a return by the sheriff, as a reason for an additional levy on personal property, that he regarded the real property previously levied upon as insufficient to satisfy the execution, is no evidence of such being the fact. The return by the officer on the execution is evidence between the parties, only when the facts stated are official acts to be done in the usual course of proceeding. Matters of opinion or excuses for failure to perform a duty cannot be thus proved.

SAME.—Satisfaction.—Presumption.—In this State, a levy upon real estate of sufficient value to pay the judgment creates a presumption of satisfaction, and there exists no distinction between the effect of a levy upon real estate and that of a levy upon personal property. This presumption of satisfaction does not arise from a mere levy, but from proof that the property levied upon is sufficient to satisfy the execution.

APPEAL from the Hamilton Common Pleas.

BUSKIRK, J.—It becomes necessary for us to dispose of a preliminary question made by counsel for appellee, before we pass upon the merits of the controversy.

This was an action of replevin by the appellee against the appellant as sheriff, to try the rights of property in certain growing corn which had been levied upon as the property of James O'Brien by the sheriff, and which was claimed by the appellee. There was issue. The cause was submitted to a jury for trial. The appellee offered his evidence in support of the issues resting upon him. The appellant demurred to the evidence. The demurrer was overruled, to which ruling the appellant excepted. The demurrer set out the evidence which had been given to the jury by the appellee and then demurred to the sufficiency of such evidence. Final judgment was rendered for the appellee, from which

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the appellant appeals and assigns for error the overruling of his demurrer to the evidence. The evidence is not put in the record by a bill of exceptions. It is insisted by counsel for the appellee, that the evidence cannot be put into the record by setting it out in a demurrer to the evidence and excepting to the ruling of the court upon such demurrer. It is conceded that such was the practice prior to our code, but it is insisted that it has abrogated such practice, and we are referred to sections 342, 343, 344, 345, 346, and 347, on pages 208 to 210, and sec. 559, on page 273, 2 G. & H.

The sections referred to, except sec. 559, relate to exceptions, and the mode of taking and placing them on the record. Sections 345 and 346 are as follows:

"Sec. 345. Where the decision objected to is entered on the record, and the grounds of objection appear in the entry, the exception may be taken by the party causing to be noted at the end of the decision that he excepts.

"Sec. 346. Where the decision is not entered on the record, or the grounds of objection do not sufficiently appear in the entry, the party excepting must reduce his exceptions to writing, and present it to the judge for his allowance and signature," etc.

The above quoted sections do not introduce any new practice, but simply re-enact the law as it has existed since bills of exceptions were introduced by statute in England. Bills of exceptions were not known to the common law, but were introduced by 13 Edw. 1. ch. 31. Until that time, if the judge decided wrongly upon any point of law, the suitor was without remedy. *Bulkeley v. Butler*, 2 B. & C. 434.

It is provided by the above quoted sections of the code, that when, in the progress of a cause, the decision objected to is entered on the record, that is, when it is a necessary part of the record, and the grounds of the objection appear in the entry, the party may cause it to be noted at the end of the decision that he excepts, and that such entry shall be sufficient to reserve the question; but when the decision is

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not entered on the record, or the grounds of the objection do not sufficiently appear in the entry, then the party cannot avail himself of any erroneous ruling unless the question is reserved and placed upon the record by a bill of exceptions.

Section 559 provides what shall constitute the transcript on appeal to this court, and how the several parts shall be made a part of the record. By that section all proper entries and all the papers relating to the cause are to be deemed parts of the record. This includes all the pleadings and the rulings of the court thereon, when presented by demurrer. All other matters must be made a part of the record by a bill of exceptions.

The complaint, answers, replies, demurrers, etc., must be filed by the clerk, and they constitute a part of the record, and when a transcript is made out the clerk is required to copy all these pleadings at large. The journal entry, by the clerk, of the filing of all pleadings is necessarily a part of the record. And where a demurrer is filed to a pleading, the demurrer, as we have said, is a natural part of the record; the entry, by the clerk, of its filing, is so also; and so is the action of the court in sustaining or overruling it. And, as the demurrer must assign causes, the ground of the decision of the court necessarily and sufficiently appears of record; and, consequently, no bill of exceptions is required. *Kesler v. Myers*, 41 Ind. 543; *Matlock v. Todd*, 19 Ind. 130.

There seems to be no room to doubt that the practice above indicated is the correct one when applied to a demurrer to the pleadings. In what does a demurrer to the evidence differ from a demurrer to the pleadings? A demurrer to a pleading admits the truth of the facts stated, while a demurrer to the evidence admits the truth of the facts proved. Both demurrers present questions of law for the decision of the court. As we have seen, the pleading demurred to, the demurrer, the ruling of the court thereon, and the exception of the party to such ruling, constitute a part of the record.

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When a demurrer is filed to the evidence, the cause, if being tried by a jury, is withdrawn from the jury, and the question is referred to the court, whether, conceding the facts proved to be true, they are sufficient in law to support the action. The old practice was, where there was a demurrer to the evidence, for the court to order a note of the evidence to be taken, which was signed by counsel on both sides, and the demurrer was affixed to the *postea*. Buller Nisi Prius, 313; Tidd Pr. 866.

But the modern practice is for the party demurring to set out in full and at length the evidence in his demurrer. This practice has been recognized and sanctioned by this court, under our code of procedure. *Griggs v. Seelcy*, 8 Ind. 264. In that case the demurrer sets out at length the evidence, and then demurs to it upon the ground that it was not sufficient to support the issue. There was a joinder in demurrer. In that case will be found a form of a demurrer to evidence and of the joinder, which has received the approval of this court.

The usual practice is for the opposite party to join in demurrer, but this is not necessary. By a joinder in demurrer the party admits that the evidence is properly set out. If the party offering the evidence is of the opinion that the evidence is not fully and correctly set out, he should refuse to join in demurrer, but should pray the judgment of the court that his adversary may not be admitted to his demurrer, until the evidence is fully and correctly set forth, and he should show to the court wherein the evidence is not fully and correctly set forth. The whole operation of entering the matter on the record and of conducting the demurrer to evidence is, and ought to be, under the direction and control of the judge sitting at the trial; and where it is objected that the evidence is not fully and correctly set forth, it is the duty of the judge to determine the question; and if the objection is found to be true, he should require the party demurring to strike out any matter improperly inserted or to insert any matter improperly omitted, until the demur-

rer speaks the truth. Tidd. Pr. 865; Buller Nisi Prius, 313.

Where there is a demurrer to evidence and a joinder, the court may have the damages assessed by the jury conditionally; or the jury may be discharged, leaving the damages to be assessed by another jury, should the demurrer be overruled. *Andrews v. Hammond*, 8 Blackf. 540. The latter is the usual and better practice.

If the demurrer is sustained to the evidence, the judgment is substantially the same as a final judgment on demurrer to the complaint or answer. The party should object to the sustaining of the demurrer, and the assignment of such ruling as error in this court presents for review whether the court erred in overruling the demurrer to the evidence.

Upon a demurrer to evidence, no advantage can be taken of any defect in the pleading, as a reason for sustaining it, but if the demurrer be overruled and a jury be summoned to assess damages, a motion may be made for a new trial for error occurring on the assessment of damages, or in arrest of judgment for any defect in pleadings which would warrant the arrest of judgment under our present system. Upon demurrer the court will infer from the evidence every conclusion the jury could reasonably have inferred from it.

In *Bulkeley v. Butler*, *supra*, BEST, J., after showing the origin and office of a bill of exceptions, proceeds to say: "But it may be asked what then is the office of a demurrer to evidence? It is this. If the party tenders a bill of exceptions, the evidence must be left to the jury; but if the party does not wish that, he may withdraw it from their consideration by a demurrer. If, however, he does not demur, he must not be placed in a better situation than if he did. Now, by a demurrer to evidence, all the facts of which there is any evidence are admitted, and all conclusions which can fairly and logically be deduced from those facts."

According to the ruling in the above case, there cannot be a bill of exceptions where there is a demurrer to the evidence, for "when the party tenders a bill of exceptions, the

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evidence must be left to the jury." This ruling is based upon sound principles, and is supported by authority. *Cole v. Driskell*, 1 Blackf. 16; *Dougherty v. Campbell*, 1 Blackf. 39; *Shields v. Arnold*, 1 Blackf. 109; *M'Creary v. Fike*, 2 Blackf. 374; *Doe v. Rue*, 4 Blackf. 263; *Andrews v. Hammond*, 8 Blackf. 540; *Griggs v. Seeley*, 8 Ind. 264; *Pawling v. The United States*, 4 Cranch, 219; *The Columbian Ins. Co. v. Catlett*, 12 Wheat. 383; *Gibson v. Hunter*, 2 H. Bl. 187.

We are very clearly of opinion that the evidence offered by the plaintiff below is properly in the record, and presents for our decision the question, whether such evidence was sufficient to support the issue resting upon the plaintiff.

The substantial facts as disclosed by the evidence are these:

The Indianapolis National Bank, on the 4th day of May, 1870, recovered, in the Hamilton Circuit Court, a judgment against James O'Brien as principal, and James M. Flanders as surety, in the sum of nine thousand nine hundred and seventy dollars and ninety-five cents, and the further sum of fourteen dollars and seventeen cents, costs of suit.

That on the 31st day of May, 1870, an execution on said judgment was in due form of law issued by the clerk of said court, directed to the sheriff of said county, commanding him, that of the property of said O'Brien as principal, and the said Flanders as surety, he cause to be made the principal, interest, and costs of such judgment; which was on the said day delivered to such sheriff.

From the return of the sheriff on such execution, it appears that on the same day the execution came to his hands, he demanded personal property whereon to levy, and was informed by O'Brien that he had no personal property subject to levy and sale upon the execution, and that the money must be made from the sale of his real estate, and directed a levy thereon.

That on the 3d day of June, 1870, the sheriff levied upon a large quantity of real estate belonging to O'Brien, subject to all liens and incumbrances thereon.

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There was rendered, in the same court and on the same day that the judgment in favor of the Indianapolis National Bank was rendered, twelve other judgments against the said O'Brien, and executions were issued on all the judgments at the same time, and the levy heretofore mentioned, and those that will hereafter be named, were made upon all the executions. The total amount of such judgments was sixteen thousand and thirty-seven dollars and sixty-nine cents.

The real estate was offered for sale on the 7th of July, 1870, and was not sold for the want of bidders.

On the 21st of July, 1870, the sheriff levied on certain personal property of O'Brien. On the 4th day of August, 1870, the sheriff levied on the property in controversy.

On the 26th day of August, 1870, the sheriff levied upon certain other personal property. On the 19th day of October, 1870, the personal property levied upon, except that in controversy in this action, was sold, and, after the payment of costs and expenses, the sum of five hundred and nine dollars and forty-six cents was applied *pro rata* upon the several executions. On the 14th day of October, 1870, the real estate was again offered for sale, and was not sold for the want of bidders. Such real estate was again advertised for sale on the 16th day of December, 1870, but was not offered from the fact that the executions expired before the day of sale.

The sheriff, in his return upon the executions, assigns as a reason for levying upon the personal property, that he did not regard the real estate levied on as sufficient to satisfy the executions in his hands.

The appellee claims to be the owner of the corn in dispute, by purchase from James O'Brien, on the 25th day of July, 1870.

Two questions arise in the record and are argued by counsel:

1. It is claimed, by counsel for appellee, that O'Brien

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did not have such a right to, or interest in, the corn as made it subject to levy and sale upon execution.

2. That the Sheriff having levied the executions upon nearly a thousand acres of land, and such land remaining unsold and undisposed of, the levy thereon amounted to a satisfaction of the execution, and that the sheriff possessed no power to levy upon the property in dispute, until it was demonstrated by an actual sale of the real estate, that it was insufficient to satisfy such executions.

The facts in reference to the ownership and possession of the corn in dispute are as follows:

The corn was growing upon the lands of O'Brien, and had been planted and cultivated by R. G. Walker and Willis Venable. Walker and Venable gave the following testimony as to the contracts between them and O'Brien. Walker said:

"I reside upon O'Brien's farm in Delaware township. I cultivated corn there in 1870. By the contract between myself and O'Brien, the division was to have been when the corn matured in the fall, at cutting-up time. Each party was to save and take care of his own half of the crop. The corn referred to was the crop of 1870, planted in the spring, at the usual time; the corn was to have been divided by rows of ten. I lived on farm and controlled part of the crop, and that I cultivated. I have been on farm three years."

Mr. Venable testified:

"Have resided on farm of O'Brien for year or two, part at Beck's station; have been there two years. I cultivated two pieces of corn on shares in 1870; there was in one piece twenty or twenty-five acres, in the other fourteen or fifteen acres. My interest in corn was one-half in part, three-fifths in part. For the year 1870 the crop was to have been divided in the fall, at cutting-up time, by rows of ten running clear across the field. Each party was to take care of and save his own part of the crop. I had nothing to do with corn after it was cultivated and divided. The large field Mr. O'Brien was to have half, and the balance two-fifths."

It is argued by counsel for appellee, that the title to the growing crop remains in the tenant so long as any thing remains to be done by him, or until the time arrives for the landlord to receive his share; and that while O'Brien had an interest in the growing corn, the farms and the corn were in the possession and under the control of his tenants, and that he had no right to enter until the time arrived for the division of the corn; and that as O'Brien had no right to enter, the sheriff had no such right, and hence could not levy and sell the corn; and in support of these positions reference is made to *Woodruff v. Adams*, 5 Blackf. 317, and *Chissom v. Hawkins*, 11 Ind. 316.

In *Woodruff v. Adams*, *supra*, it was held, that where the landlord was to receive his share of the crop on other premises than those let, his share was in the nature of rent, and until that was delivered, the exclusive ownership of the crop was in the raiser; but where the landlord was to receive his share of the crop standing in the field, on the premises let, he was jointly interested with the producer in the crop while it was growing and would have the right of entry.

In *Chissom v. Hawkins*, *supra*, the tenant agreed to pay as rent, for one hundred acres of tillable land and twenty-five acres of pasture land, one thousand seven hundred bushels of corn, which was to be husked and cribbed in good order.

The above case differs from the one under consideration in several particulars. In that case the tenant was to husk and crib the corn, which was to be delivered as rent and not as a share of the product raised. There a delivery was contracted for. In the case under consideration no delivery was contracted for or necessary. WORDEN, J., in delivering the opinion of the court, says: "It may be observed that, by the terms of the lease, Wright was to pay as rent one thousand seven hundred bushels of corn; but not necessarily the specific corn that he might raise on the premises. That amount he was to pay, whether he raised it or not, and the payment of that amount, either in corn raised on the

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premises, or otherwise procured, would have discharged his contract."

It is very obvious that under such a contract the landlord would have no joint interest with the tenant in the growing crop. The tenant would be the exclusive owner of the crop, until it was secured and the rent was delivered to the landlord.

If the corn in controversy was subject to sale upon the executions, then they created a lien on the growing corn from the time they came to the hands of the sheriff, and a sale of the corn could not divest such lien.

The title of the appellee depends upon the validity of his purchase from O'Brien, and we are unable to see how O'Brien could vest in his vendee a good title, and yet not possess such title to the corn as would make it subject to the executions. Counsel for the appellee attempt to explain the apparent inconsistency by the argument that a growing timber tree is the subject of a contract, but cannot be levied on by an attachment or execution, and that growing fruit in an orchard can not be levied upon and sold upon execution, but that such fruit may be sold by the owner, and a contract for its sale can be enforced, and reference is made to *Conklin v. Foster*, 57 Ill. 104, published in April No. of Law Reg. for 1873, p. 257. The only point decided in that case, having any application to the one under consideration, is, that "a sheriff has no power to levy on and sell houses, timber or ornamental trees, and sever them from the fee."

It appears from the abstract published in the Register that the case arose under the homestead law, and the question which seems to be involved was, whether houses erected and trees planted by a tenant for a term of years were exempted from sale under said law, and it was held that they were. The case has but little, if any, application to the present case.

It was decided by this court, in *Northern v. The State, ex rel. Lathrop*, 1 Ind. 113, that growing crops, raised annually by labor, are the subject of sale as personal property, before maturity, and that their sale does not necessarily involve an interest in the realty requiring a written agreement.

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The distinction between the annual productions of the earth which are produced by annual planting, cultivation, and labor and such as are not, is stated with great clearness and accuracy by Mr. Chief Justice ROBERTSON, in *Craddock v. Riddlesbarger*, 2 Dana, 205, where he says: "Although such annual productions or fruits of the earth as clover, timothy, spontaneous grasses, apples, pears, peaches, cherries, etc., are considered as incidents to the land in which they are nourished, and are, therefore, not personal, nevertheless, every thing produced from the earth by annual planting, cultivation and labor, and which is therefore denominated, for the sake of contradistinction, *fructus industriæ*, is deemed personal and may be sold, as personalty, even whilst growing and immature. And the purchaser of such an article in such a growing state will have the consequential right of ingress and egress, for purposes of cultivation, preservation and removal, though he will have acquired no interest in the land itself, nor any other control or dominion over it, than such as may be necessarily incident to his right to the growing *fructus*. *Parham v. Thompson*, 2 J. J. Mar. 159, and the authorities therein cited; and also *Eaton v. Southby*, Willes, 131. The authorities leave no pretext for doubting that growing corn is a chattel, and, as such, may be sold by the owner, or taken by an officer in virtue of a process of *fieri facias*. The only doubt which has been intimated, is as to the proper time of selling under an execution. But, though some have expressed the opinion, that the sale should be postponed until after the corn shall have been matured and severed from the land, and though such a course might often be advantageous to all parties concerned, still it seems to us that, prior to an act of the last legislature, the law conceded the right to sell the corn in the condition in which it was when the execution was levied on it. The right to levy implies the right to sell, as soon as legal notice can be published of the time and place of sale, and of the thing to be sold."

We think that the corn in dispute was subject to levy and:

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sale as the property of O'Brien ; that the executions created a lien thereon from the time they came to the hands of the sheriff; and that the subsequent sale of the corn, by O'Brien to the appellee, in no manner impaired or destroyed such lien.

It remains to inquire whether the second position assumed by counsel for appellee is tenable.

It was shown by the evidence, to which a demurrer was overruled, that there were thirteen judgments against O'Brien, amounting in the aggregate to sixteen thousand and thirty-seven dollars and sixty-nine cents ; that executions were issued upon all of said judgments and placed in the hands of the sheriff; and that he levied such executions upon nearly a thousand acres of land.

There was no proof as to the value of the lands so levied on. It is true that the sheriff in his return states, as a reason for levying upon personal property, that he did not regard the levy upon the real estate sufficient to satisfy the executions in his hands, but we are of opinion that, while the return of the sheriff is evidence, the reasons which operated on his mind in inducing him to make the levy upon personal property cannot be regarded as evidence of the truth of the reason stated.

The naked question is therefore presented, whether a levy upon a large body of land, without any proof as to the value of such land raises the presumptions that the land so levied on was of sufficient value to satisfy the executions, and that such judgments are to be deemed satisfied until the insufficiency of such land is made manifest by a sale and return.

It is well settled by repeated decisions of this court, that a levy upon lands or goods, of sufficient value to pay the judgment upon which the execution issued, raises the presumption that the judgment is satisfied ; and another levy by virtue of the same writ cannot be made, until the property first levied on has been legally disposed of, and its insufficiency shown by an actual sale. *Lasselle v. Moore*, 1 Blackf. 226; *M'Intosh v. Chew*, 1 Blackf. 289; *Miller v. Ashton*,

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Blackf. 29; *Stewart v. Nunemaker*, 2 Ind. 47; *Doe v. Dutton*, 2 Ind. 309; *Law v. Smith*, 4 Ind. 56; *Barret v. Thompson*, 5 Ind. 457.

The return of an officer on an execution can only be evidence of the facts as between the parties, when the facts stated are official acts done in the ordinary and usual course of proceedings. Matters of opinion or excuse for failure to perform a duty cannot be made evidence by stating them in the return, but must be proved on trial. Crocker Sheriffs, 32, sec. 47; Gwynne Sheriffs, 476; *Holderman v. Brasfield*, 6 Litt. 271; *Bruce v. Dyall*, 5 T. B. Mon. 125; *Williams v. Cheesebrough*, 4 Conn. 356; *Denton v. Livingston*, 9 Johns. 96.

In *M'Intosh v. Chew*, *supra*, it was held that a levy raised the presumption of satisfaction, and that the plaintiff was barred from taking any other steps, until the property levied on was clearly and legally shown to be insufficient.

It is very manifest to us that the learned judge who delivered the opinion of the court in that case did not intend to hold that a mere levy, without reference to the value of the property levied on, raised a presumption of satisfaction. The cases referred to lay down the proposition, that a levy upon property sufficient to pay the debt raises the presumption of satisfaction. Such is the rule as laid down in all the other decisions of this court, and by all the text writers and adjudged cases in this country and in England. We have found no other authority which holds that a mere levy, without reference to the sufficiency of the property to pay the debt, raises a presumption of satisfaction. None of the decisions assumes that a levy produces any absolute satisfaction. It is a satisfaction *sub modo*. So long as the property remains in legal custody, the other remedies of the creditor will be suspended. He cannot levy on other property with the same writ, nor can he have a new execution against the person or property of the debtor, nor maintain an action on the judgment, nor use it for the purpose of becoming a redeeming creditor.

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Inasmuch as the appellee bases his right upon the theory that the lands levied upon were of sufficient value to pay the judgments against O'Brien, he assumed the burden of showing by sufficient proof that they were of such value. The presumption of satisfaction does not arise from a mere levy, but from a sufficient levy, and as the appellee wholly failed to prove the value of the lands levied on, no presumption could be indulged that they were of such value. By the demurrer to the evidence the appellant admitted all the facts proved, and all the conclusions which could be fairly and logically deduced from such facts. The court could not fairly and logically deduce from the fact of the levy the conclusion that the property levied on was of sufficient value to pay all the judgments.

From the fact that there is some confusion in the books and some uncertainty as to the effect of a levy upon property, we are induced to make an extended quotation from the recent decision of the Supreme Court of the United States, in the case of *United States v. Dashiell*, 3 Wal. 688.

CLIFFORD, J., speaking for the court, says: "Actual satisfaction beyond the amount specified in the return of the marshal cannot be pretended, but the theory is, that the levy of the execution in the manner stated affords conclusive evidence that the whole amount was paid, and it must be admitted that one or two of the decided cases referred to appear to give some countenance to that view of the law; that is, they assert the general doctrine, that the levy of an execution on personal property sufficient to satisfy the execution operates *per se* as an extinguishment of the judgment. None of those cases, however, afford any support to the theory that any such effect will flow from the issuing of an execution, and the levying of the same upon land. On the contrary, the rule is well settled, that in the latter case no such presumption arises, because the judgment debtor sustains no loss by the mere levy of the execution, and the creditor gains nothing beyond what he already had by the

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lien of his judgment. Reason given for the distinction is that the land in the case supposed remains in the possession of the defendant, and he continues to receive and enjoy the rents and profits. Many qualifications also exist to the general rule as applied to the levy of an execution upon the goods of the judgment debtor, as might be illustrated and enforced by numerous decided cases. Where the goods seized are taken out of the possession of the debtor, and they are sufficient to satisfy the execution, it is doubtless true, that if the marshal or sheriff wastes the goods, or they are lost or destroyed by the negligence or fault of the officer, or if he misapplies the proceeds of the sale, or retains the goods and does not return the execution, the debtor is discharged; but if the levy is overreached by a prior lien, or is abandoned at the request of the debtor or for his benefit, or is defeated by his misconduct, the levy is not a satisfaction of the judgment. Rightly understood, the presumption is only a *prima facie* one in any case, and the whole extent of the rule is that the judgment is satisfied when the execution has been so used as to change the title of the goods, or in some way to deprive the debtor of his property. When the property is lost to the debtor in consequence of the legal measures which the creditor has pursued, the debt, says BRONSON, C. J., is gone, although the creditor may not have been paid. Under these circumstances the creditor must take his remedy against the officer, and if there be no such remedy he must bear the loss."

It will be observed that in the above opinion a distinction is drawn between the effect of a levy upon personal property and real estate. The same distinction is recognized in the most of the states of the Union, as is shown by the authorities hereafter referred to. But in this State no such a distinction has been made. The rule has existed in this State from the organization of the State, that a levy upon real estate of sufficient value to pay the judgment creates a pre-

Dobson v. The Duck Pond Ditching Association.

essence of the crime or misdemeanor, the indictment must show that the violation of law was at that time. This indictment does not do so.

To transpose the language in the indictment, it reads thus : October 1st, 1871, was the first day of the week, and on or about that day the defendant was found hunting. On or about, when the day is essential to the commission of the offence, does not mean, in a penal statute or prosecution, the very day. The court committed no error in quashing the indictment.

The judgment is affirmed.

R. B. F. Pierce and *J. C. Denny*, Attorney General, for the State.

DOBSON v. THE DUCK POND DITCHING ASSOCIATION.

PRACTICE.—*Assignment of Error.*—An assignment of error cannot enlarge a motion for a new trial.

DRAINING ASSOCIATION.—*Assessment.*—*Pleading.*—An action to enforce the collection of an assessment for the construction of a drain is based upon the assessment, and not upon the articles of association. The filing of a copy of the articles does not make them a part of the complaint.

SAME.—*Filing Bond with Clerk.*—*Practice.*—If it is a valid objection that a bond has not been filed with the clerk of the circuit court by the association, it is remedied by filing one on the trial.

APPEAL from the Hendricks Common Pleas.

BUSKIRK, J.—This was an action by the appellee against the appellant, to enforce an assessment for the construction of a drain.

The court overruled a demurrer to the complaint, and appellant excepted.

There was issue, trial by the court, finding for the appellee, motion for a new trial made and overruled, and judgment on the finding.

There are seven assignments of error, but only two of them present any question, and they are, the overruling of the demurrer to the complaint and the motion for a new trial. The others would have been valid reasons for a new trial, but they were not assigned as such. The motion for a new trial cannot be enlarged by an assignment of error. The only reasons assigned for a new trial were, that the finding was contrary to law and not supported by the evidence. The questions, therefore, discussed by counsel for appellant, as to the admission of incompetent evidence and the amendment of the complaint on trial, do not arise in the record. The only questions for our decision are, whether the court erred in overruling the demurrer to the complaint, and whether the finding was sustained by sufficient evidence.

Several objections are urged to the complaint:

1. That the articles of association filed with the complaint do not sufficiently show the *termini*, course, and distance of the main ditch and the branches. It is well settled, by repeated decisions of this court, that such an action as this is, is based upon the assessment, and not on the articles of association, and that the filing of such articles does not make them a part of the complaint. The question, therefore, sought to be raised does not properly arise in the record.

2. That it is not shown that there was a survey and estimate of the cost of the construction before the commencement of the work and the making of the assessment. The objection is not sustained by the record. The fact was averred in the complaint and proved on the trial. *The Excelsior Draining Company v. Brown*, 38 Ind. 384, and cases there cited.

3. That it is not shown that the appellee had filed a bond with the clerk of the circuit court, as required by the statute. If the objection was ever valid, it was remedied by an amendment on the trial.

We think there was no error in overruling the demurrer to the complaint.

It remains to inquire whether the finding was sustained by

Hardesty et al. v. Fordice et al.

the evidence. We have carefully read all the evidence, and find that it is very full and complete upon every point in the case. We think the finding was fully sustained by the evidence.

The judgment is affirmed, with costs.

C. C. Nave and *C. A. Nave*, for appellant.

L. M. Campbell, for appellee.

HARDESTY ET AL. *v.* FORDICE ET AL.

VENDOR'S LIEN.—*Promissory Note*.—*Fordice v. Hardesty*, 36 Ind. 23, adhered to.

APPEAL from the Parke Circuit Court.

DOWNEY, J.—The appellees sued the appellants upon certain promissory notes, which were executed by the appellants to one Hamilton and by him indorsed to the appellees. The result was a judgment for the appellees, from which the appellants appealed to this court.

The notes which are the foundation of this action were executed at the same time, between the same parties, and for the same consideration, as the notes which were the causes of action in the case of *Fordice v. Hardesty*, 36 Ind. 23, and, except that the parties are reversed in this court, this case is, in all respects, like that, and the questions are the same. For the reasons there given, this case must be affirmed.

The judgment is affirmed, with four per cent. damages and costs.

D. E. Williamson and *A. Daggy*, for appellants.

J. M. Allen, *W. Mack*, *D. H. Maxwell*, *S. F. Maxwell*, and *S. D. Puett*, for appellees.

PRINCE ET AL. v. THE STATE, EX REL. SAGE ET AL.

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SHERIFF'S BOND.—Pleading.—Demurrer.—In a suit upon a sheriff's bond, a failure to set out the bond with the complaint renders the complaint bad on demurrer.

APPEAL from the Tipton Circuit Court.

DOWNEY, J.—Upon an examination of the record in this case, we find that it was an action by the appellees against the appellants on a sheriff's bond, in which Prince was the principal and the other appellants his securities. The complaint was in three paragraphs, the first of which was stricken out on motion of the defendant. Demurrers to the second and third were overruled, and the defendants excepted. The defendants filed an answer, and there were demurrers to the fifth and sixth paragraphs thereof, which were sustained, and the defendants again excepted. The issues were completed, there was a trial by the court, and a special finding, on which, over a motion for a new trial, judgment was rendered for the plaintiffs.

Errors are assigned calling in question the correctness of the rulings of the court in overruling the demurrers to the complaint, in sustaining the demurrers to the fifth and sixth paragraphs of the answer, and in various other particulars.

In attempting to understand and determine the first question, that is, the sufficiency or insufficiency of the second and third paragraphs of the complaint, we have examined the record, and fail to find, in connection with the pleadings, any copy of the bond on which these paragraphs are founded. The paragraphs do not set out either the tenor or purport of the bond. Hence we are unable to know what was in the bond, or that the matters alleged as a breach of its condition were such as to constitute a cause of action.

The demurrer says they were not sufficient. Under such a demurrer it has been repeatedly ruled by this court, that a failure to file the original or a copy of the instrument, on

Ricketts v. Braun et al.

which the pleading is founded, is a fatal defect in the pleading. *Wolf v. Schofield*, 38 Ind. 175; *The Peoria, etc., Ins. Co. v. Walser*, 22 Ind. 73, and cases there cited. Hence we must hold that the second and third paragraphs of the complaint were not sufficient, and that the demurrers to them should have been sustained. It may be well enough to state that each of the paragraphs in question alleges that a copy of the bond is filed, and such may have been the fact. But we are not allowed to infer such filing, in the absence of the instrument in the record in connection with the pleadings.

The next question relates to the sufficiency of the fifth and sixth paragraphs of the answer. We cannot decide whether these paragraphs of the answer were sufficient or not, when we do not legally know what the cause of action was.

The same may be said as to the other questions presented.

The judgment is reversed, with costs, and the cause remanded, with instructions to sustain the demurrers to the second and third paragraphs of the complaint.

Bell & Bell, C. N. Pollard, N. P. Richmond, and C. E. Hendry, for appellants.

R. Vaile, for appellees.

RICKETTS v. BRAUN ET AL.

BOND OF INDEMNITY.—Mortgage.—False Representation.—Contract.—Where a person who, as surety, had executed an indemnifying bond, and, to secure himself against liability, had taken from his principal a mortgage upon certain land, induced a purchaser of the land so mortgaged to agree in writing to assume all the obligations under the bond, and also induced him to pay over to him, said surety, the balance of the purchase-money of the land, after the

Ricketts v. Braun et al.

discharge by said purchaser of certain debts, which said principal and surety had represented to such purchaser as the only obligations secured by the indemnifying bond;

Held, that said surety could not require said purchaser to repay to him other moneys afterward collected from said surety, under such bond, for liabilities not disclosed to the purchaser.

NEW TRIAL.—*Motion.*—That the court erred in permitting improper, illegal, and irrelevant testimony to be given on the trial, is not a sufficient statement of a ground for a new trial.

APPEAL from the Rush Common Pleas.

PERRIT, J.—This suit was brought by the appellant against the appellees, and the complaint, in substance, shows the following facts: That one Anderson as principal, and appellant as surety, executed their bond to one Horr, to indemnify him against all liability or loss by reason of his having been a member of the firms of Horr & Anderson and Anderson & Burns; that appellant, to indemnify himself as surety for Anderson, had certain real estate mortgaged to him by Anderson; that appellees bought of Anderson his equity of redemption, and secured a release of his mortgage by appellant, and as a consideration therefor made the following agreement, endorsed on the indemnity bond of Anderson and appellant to Horr:

“I, William Braun and Thomas Heaton, do hereby bind ourselves to do all the matters and things mentioned, and fulfil all the obligations that the said Edward Anderson and Daniel Ricketts are bound to do for the said Thompson Horr, and at the time and in the manner mentioned in the agreement hereto annexed.

WILLIAM L. BRAUN,
“THOMAS HEATON.”

The complaint then alleges a failure to comply with this agreement, and that appellant, by suit, was compelled to and did pay four hundred and seventy-six dollars on account of the liability of Anderson under the bond given by him and Anderson to Horr. These facts are given with great circumstantiality as to dates, claim, suit, judgment, execution, and payment; and the complaint demands judgment for six hundred dollars and costs.

Ricketts v. Braun *et al.*

To this complaint the defendants, appellees, answered as follows:

"The defendants, for answer to the complaint, say that on the — day of —, 186—, they purchased of said Edward Anderson (who claimed to have some interest in the same) and the plaintiff (who had the legal title to the same), for the sum of one thousand six hundred dollars, the following real estate situate in Rush county, State of Indiana, to wit: A part of town lot No. 56, in the original plat of the town of Rushville, bounded as follows: commencing forty-five feet north of the S. W. corner of said lot, No. 56, and running thence south twenty-five feet, thence by a parallel line from each corner back east across said lot to the east line thereof, embracing all of said lot within said parallel lines; and that as a part of the purchase-money of said real estate, the defendants agreed to pay the following named debts of said Anderson: to David Wilson \$200, secured by mortgage on said property; to Frank Bowen \$200, on note; to Edward Anderson \$381; to James Burns \$302.91, cash; to plaintiff \$496.09; which were represented by the plaintiff and the said Anderson, prior to and at the time of making such purchase, as all the debts said Anderson and said Ricketts were bound for upon the written agreement named in the complaint; and the defendants relying upon the said representations of said Anderson and the plaintiff as to the indebtedness for which Anderson and the plaintiff were bound on said written agreement, and believing the said representations to be true, were induced by the plaintiff to execute the written agreement named in the complaint; and in order to secure the payment of the above named debts and none other, these defendants, at the request of the plaintiff, signed the written agreement named in the complaint; that the remainder of said purchase-money the defendants paid over to the plaintiff in cash; that they have fully paid and satisfied each and all of the above debts and obligations of the said Anderson and the plaintiff; and that the said debt named in the plaintiff's complaint was not named or mentioned as

one of the debts of said Anderson or plaintiff, nor had the defendants any knowledge of the same, nor did they ever agree to pay the same. Wherefore, having fully paid the said purchase-money for said real estate and discharged and satisfied all of the debts of the said Anderson and the plaintiff which they agreed to pay and satisfy, they pray judgment for costs and all proper relief."

Is this a good answer to the complaint? We hold that it is. The appellant had gone security for Anderson in an indemnifying bond to Horr, and had taken a mortgage on real estate to secure himself, and he and Anderson had sold the same real estate to appellees for one thousand six hundred dollars, and had by false representations induced the appellees to take the place or liability of Anderson and appellant on the indemnifying bond to Horr. Anderson and appellant represented that only certain specified debts of Anderson were to be secured by appellees; and relying on these representations, they signed the instrument sued upon, when, in fact, there were other debts that Anderson and appellant were liable for to Horr on their indemnifying bond. Appellees paid all the specified debts and the residue of the purchase-money for the real estate to the appellant, thus having paid all they agreed to pay for the real estate. If appellees were liable on their agreement for other or further debts of Anderson, then Ricketts, the plaintiff below and appellant here, ought not to have taken the balance of the purchase-money, but should have left it in the hands of the appellees, to discharge such other or further debts of Anderson, and Ricketts ought not to be allowed legally to say, I have got all the money the appellees agreed to pay for the real estate, and have a large part of it in my pocket; but because they signed a paper upon my misrepresentations, and as I have been compelled to pay money on the indemnity bond which I gave, I want them to pay that amount to me over and above the amount they agreed to pay for the real estate which they got; although I have the full price of it in my pocket. In

 Curry v. Miller.

Bischof v. Coffelt, 6 Ind. 23, this court says: "If the representations of one party, in a case where such representations are calculated to inspire confidence, are confided in and acted upon by another as true, when in reality they are false, and thereby the latter is induced to enter into a contract which otherwise he would not have made, the law will declare the transaction fraudulent and void, without reference to the motive of the party inducing the fraud." See, also, *Matlock v. Todd*, 19 Ind. 130, which is fully in point in this case. The holding of this answer to be good disposes of all the real questions in this case. In a motion for a new trial, the second reason is thus stated: "The court erred in permitting improper, illegal, and irrelevant testimony to be given upon the trial of this cause."

We have often held that this reason for a new trial is insufficient, as it does not point out or refer to what illegal evidence was admitted; and we do not feel it to be our duty to again give the reasons for this ruling. There was a motion in arrest of the judgment overruled. It follows that if the answer was sufficient, then all other rulings of the court were correct, as the evidence fully sustained the answer.

The judgment is affirmed, at the costs of the appellant.

G. B. Sleeth, B. L. Smith, J. E. McDonald, J. M. Butler,
and *E. M. McDonald*, for appellant.

L. Sexton, for appellees.

 CURRY v. MILLER.

CONTEST OF ELECTION.—*Affidavit*.—*County Auditor*.—The county auditor has authority to administer the oath as to the truth of the matters stated as grounds for contesting an election to the office of county clerk.

PRACTICE.—*Special Finding*.—*Exception to Conclusions*.—*Motion in Arrest*.—*Exception to Judgment*.—Where there is a special finding of facts, with conclusions of law thereon, there must be an exception to the conclusions of law, to reserve the question of the correctness of the conclusions. A motion in arrest

Curry v. Miller.

of judgment, if available, is waived by not assigning the ruling thereon as error. Nor is an exception to the judgment available, as that must follow the finding and conclusions.

DEMURRER.—*Sufficiency of Affidavit.*—A demurrer assigning a want of sufficient facts as causes stated for contesting an election presents no question as to the sufficiency of the affidavit.

PRACTICE.—*Motion to Dismiss.*—*Special Cause.*—A refusal to grant a motion to dismiss a case, on a special ground assigned, which is insufficient, is not erroneous, although other grounds might have justified such dismissal.

JURISDICTION.—*Erroneous Decision.*—The power of the board of commissioners to hear and determine upon the sufficiency of the affidavit filed to contest an election constitutes jurisdiction. If the decision be wrong, it is simply erroneous, and not void.

APPEAL from the Boone Circuit Court.

WORDEN, J.—At the election for the year 1868, the appellant and the appellee were respectively candidates for the office of Clerk of Boone county. The board of canvassers declared that Miller had received for the office two thousand four hundred and sixty-three votes, and that Curry had received for the office two thousand four hundred and eighty-seven votes, and that the latter was duly elected to the office by a majority of twenty-four votes.

Miller instituted proceedings before the board of commissioners of Boone county, to contest the election of Curry, on the ground of illegal votes being polled for him, and to procure himself to be declared duly elected to the office. On the trial of the cause the board of commissioners found that Curry had received two thousand four hundred and forty-two legal votes, and that Miller had received two thousand four hundred and fifty-eight legal votes, and that the latter was duly elected.

Curry appealed to the circuit court, and upon trial in that court, where the cause was tried by the judge, it was found that Miller had received a majority of one vote, and was entitled to the office, and it was adjudged accordingly.

Curry appeals to this court, and assigns the following errors :

“ 1. The court erred in overruling the motion of the

Curry v. Miller.

appellant to dismiss the cause for the want of jurisdiction, to which ruling the appellant excepted at the time.

"2. The court erred in its judgment upon the facts specially found, in excluding from the count, in favor of the appellant, twenty-seven votes polled for him in Jackson township, the same according to the facts so found being legal votes and properly received by the board of election in said township and county for the appellant.

"3. The court erred in its judgment pronouncing the appellee elected clerk of the circuit court of the county of Boone, when, according to the facts as found specially by the court, the appellant was duly elected to said office by a majority of the legal votes cast at said election in said county; wherefore," etc.

The points made under the first assignment of error are, that the affidavit attached to the statement of the grounds of the contest, filed before the board of commissioners, is insufficient in two particulars. 1st. That it was sworn to before the county auditor, who, it is claimed, had no authority to administer the oath. 2d. That the matters were sworn to be true as the affiant was informed and verily believed, and not positively.

The first point has been decided against the appellant by this court in two cases, where it was held that the auditor has authority to administer the oath in such cases. *Wheat v. Ragsdale*, 27 Ind. 191; and *Garrett v. Higgins*, 27 Ind. 162. We are satisfied with the reasoning and conclusion of the court in these cases. In *Wheat v. Ragsdale* the question was fully considered, and we do not deem it necessary to add any thing to what is there said on the subject. The conclusion is such as must have been arrived at by us, had the question been an open one.

The first assignment of error is not available.

The questions sought to be raised under the second and third assignments of error do not legitimately arise in the record.

There was a special finding by the court of the facts in the

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case, at the request of the parties. The court found that the appellant, Curry, received in all two thousand four hundred and eighty-seven votes, but that forty-six of these were cast by persons, naming them, who were not legally entitled to vote at the townships and precincts where their votes were cast, leaving his total legal vote two thousand four hundred and forty-one. The court also found that the appellee, Miller, received in all two thousand four hundred and sixty-three votes, but that twenty-two of these were cast by persons, naming them, who were not legally entitled to vote at the townships and precincts where their votes were cast, leaving his total legal vote two thousand four hundred and forty-one, but that one legal vote was offered for him and rejected, which should be counted for him, giving him a majority of one vote. Therefore the court found that Miller received a majority of the legal votes cast for the office. There was also a more general and extended finding or opinion of the court, occupying forty-eight pages of the record, embracing a discussion of the law on the subject of the elective franchise, both constitutional and statutory, and the subjects of registry, residence, and domicil, together with the evidence as it applied to the particular voters whose votes were held to be legal or illegal, and the reasons for thus holding.

There was a motion for a new trial, which was overruled, but this ruling is not assigned for error, nor is the evidence in the record.

There was no exception taken to the conclusions of law drawn by the court from the facts found. This was necessary in order to present any question arising on such conclusions. *Crusan v. Smith*, 41 Ind. 288.

The record informs us that the appellant "moved in arrest of judgment upon the finding," but that the motion was overruled, and he excepted. This ruling is not assigned for error; even if it could be made to take the place of an exception to the conclusions of law from the facts found.

Exception was taken to the rendering of judgment against the appellant. But judgment followed inevitably unless the

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court was wrong in its finding of the facts, or in its conclusions of law upon those facts. The evidence not being in the record, and there being no assignment of error upon the overruling of the motion for a new trial, we cannot say that the evidence did not sustain the court's finding of the facts; and there being no exception to the conclusions of law from the facts, if the court erred in its conclusions, the error is not so presented here as to enable us to reach it.

The judgment below is affirmed, with costs.

ON THE RE-SUBMISSION OF THE CAUSE.

WORDEN, J.—This cause was once decided by this court, and the foregoing opinion and judgment were pronounced. Afterward a rehearing was asked for and granted, on one question, viz., whether the affidavit appended to the statement of the grounds of contest was sufficient. The authorities cited in the petition for a rehearing raising some doubts in our minds as to the sufficiency of the affidavit, we deemed it right that a rehearing be had on that question, in order that it might be more thoroughly examined and considered.

On the re-submission of the cause, additional briefs have been filed by both parties. The appellee insists that no question as to the sufficiency of the affidavit is raised by the record. We have again inspected the record, and are clearly of opinion that the point is well taken. In the commissioners' court, the appellant herein filed a demurrer to the statement of the grounds of contest, assigning for cause that the same did not state facts sufficient to constitute a ground of contest, etc. This was overruled by the commissioners, and an answer was filed. After the cause came into the circuit court, the record shows the following entry: "And the court, being sufficiently advised, overruled the demurrer of contestee to the complaint herein, to which ruling the contestee excepts." The answers filed had not been withdrawn, nor had any demurrer been filed in the circuit court. The demurrer thus overruled must have been the one filed

before the board of commissioners. That demurrer did not make any objection to the affidavit. Had it done so, although not one of the statutory causes of demurrer, possibly it might have been regarded in the light of a sufficient motion to raise the question as to the sufficiency of the affidavit. As it assigned for cause only the want of sufficient facts, no question was thereby raised as to the sufficiency of the affidavit. The following cases are directly in point: *Denny v. Moore*, 13 Ind. 418; *Wells v. Dickey*, 15 Ind. 361.

The record contains the following entry:

“And the contestee moves the court to dismiss this cause, on account of the grounds of the contest being sworn to by the contestor before the auditor of the county; which motion is overruled by the court, to which ruling of the court the contestee excepts.”

The ruling on the demurrer as above stated, and the above entry showing the motion and the action of the court thereon, constitute all there is in the record as to the action of the circuit court in relation to the sufficiency of the affidavit. It is quite clear that no question was raised or decided in the court below as to the sufficiency of the affidavit, aside from the question as to the power of the auditor to administer the oath.

But the appellant argues that the motion to dismiss, made on the ground that the affidavit was sworn to before the auditor, ought to have been sustained on the ground that the affidavit was in itself insufficient. He says that “the recital of the ground of the motion did not limit the inquiry of the court to the consideration of that ground only.” If the court below had dismissed the cause for any good reason, whether on motion or otherwise, there could be no error in such action. But it cannot be error for the court to refuse to dismiss on some ground specially pointed out, because there was some other ground, not pointed out, which would have justified a dismissal. As to such other ground not pointed out or made the basis or foundation of the motion, the case stands as if no motion had been made.

It is claimed by the appellant that, unless there was a

sufficient affidavit, the board of commissioners had no jurisdiction to hear and determine the cause; and, hence, that as it is a question of jurisdiction, advantage may here be taken of the supposed defect in the affidavit, although no objection was taken to it in the court below.

If this proposition be true, and the affidavit be defective, then the whole proceedings in both courts below are void for want of jurisdiction, and Curry is entitled to the office by virtue of his original certificate from the board of canvassers.

But the supposed defect in the affidavit did not go to the jurisdiction of the board of commissioners. That body is the tribunal constituted by law for the trial of contests of elections. The contest of an election is in the nature of a civil proceeding. The law vests them with jurisdiction over the subject-matter, and they had in this instance acquired jurisdiction over the parties. The grounds of contest are to be verified by affidavit. But who is to determine in the first instance whether the affidavit filed is sufficient? Clearly the board of commissioners. This power of hearing and deciding upon the validity of the affidavit constitutes jurisdiction. *Dequindre v. Williams*, 31 Ind. 444. The board may decide wrongfully and hold an insufficient affidavit to be good, but their decision is simply erroneous and not void, and will be binding unless appealed from. These views are fully sustained by the following, among other authorities: *The Board of Commissioners of Knox County v. Aspinwall*, 21 Howard, 539; *The Evansville, etc., Railroad Co. v. The City of Evansville*, 15 Ind. 395; *Snelson v. The State*, 16 Ind. 29; *Weston v. Lumley*, 33 Ind. 486, and authorities there cited.

The question on which a rehearing was granted not being legitimately in the record, there remains nothing further to be considered. The original opinion, except as to that point which relates to the sufficiency of the affidavit, will be filed herewith as a part of the opinion in the cause.

The judgment below is affirmed, with costs.

Mains v. The State.

S. A. Huff, B. W. Langdon, J. S. Pettit, C. C. Galvin, and S. Claypool, for appellant.

T. J. Cason, R. P. Davidson, C. S. Wesner, and A. E. Gordon, for appellee.

MAINS v. THE STATE.

CRIMINAL LAW.—Indictment.—Nuisance.—The keeping of a house where tippling and whoring are carried on is not a nuisance, unless the public is affected by it, and an indictment therefore must show such facts as establish this consequence.

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APPEAL from the Noble Circuit Court.

WORDEN, J.—The appellant was indicted for a nuisance and convicted, and judgment was rendered against her over motions to quash and in arrest of judgment. Exception.

The following is the indictment:

“STATE OF INDIANA }
NANCY MAINS. } Indictment for Nuisance.

“The Grand Jurors of Noble County, in the State of Indiana, good and lawful men, duly and legally empanelled, charged, and sworn to inquire into felonies and certain misdemeanors, in and for the body of said county of Noble, in the name and by the authority of the State of Indiana, on their oaths present, that one Nancy Mains, late of said county, on the 20th day of April, in the year A. D. 1872, and on divers other days and times between that day and the making of this presentment, at the county of Noble and State of Indiana, did then and there unlawfully keep and maintain a certain common, ill-governed, and disorderly house, and in said house certain persons, as well men as women, of ill name and fame, and of dishonest con-

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versation, then and there, on the said other days and times, unlawfully and willingly did cause and procure to frequent and come together, and the said men and women in the said house of said Nancy Mains at unlawful times, as well in the night as in the day, then and on the said other days and times, there to be and remain, drinking, tippling, whoring, and misbehaving themselves, unlawfully and wilfully did permit, and yet doth permit, to the great damage and common nuisance of all the citizens of the State of Indiana, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Indiana.

WILLIAM B. McCONNELL,

“Prosecuting Attorney.”

Several objections are made to the indictment, but we shall notice one only, as that seems to be fatal, whatever might be said in respect to the others.

The indictment does not allege that the house which the appellant was charged with keeping was situate in any public place, as in a city, town or village, nor near any public street or highway; nor does it allege that any person resided near thereto, or was in the habit of passing thereby. In short, there is nothing in the indictment which shows that the house was in the vicinity of any inhabitants, or that any person ever came near it, save those who congregated there by the alleged procurement of the appellant. In the language of the counsel for the appellant, “for aught that appears, it may have been in the woods, away from the sight and hearing of every citizen of the State.”

The keeping of a house where tippling, drinking, and whoring are carried on is not a nuisance, unless the public is affected by it.

A writer on criminal law says: “The term disorderly house is sometimes used in a very broad sense, as including bawdy-houses, common gaming-houses, and places of a like character, to which people promiscuously resort for purposes injurious to the public morals, or health, or convenience, or safety. These places are all indictable as public nuisances.

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* * A house so kept that no persons other than its inmates are liable to be disturbed by it, or corrupted in their morals, or anything of the sort, is not in law a disorderly house. * * The difficulty within must reach beyond the mere inmates, and affect the public." 1 Bishop Crim. Law, secs. 1046, 1051.

Inasmuch as such a house as that described in the indictment is not a nuisance *per se*, but can only become so by reason of the public being affected thereby, the indictment should have alleged the facts making it a nuisance, as that it was in a public place, or that people resided near thereto, or other similar circumstances, showing that the public was affected thereby.

"The indictment for a nuisance, as for every other offence, must set out so much of fact as to make the criminal nature of what is charged against the defendant appear. Thus, where a thing is not a nuisance in itself, but becomes so only by reason of particular circumstances, this special matter—in other words, these circumstances—must be shown; else there is no crime laid against the defendant." 2 Bish. Crim. Proced., sec. 813.

The indictment, it is true, alleges that it was "to the great damage and common nuisance of all the citizens of the State of Indiana," but this conclusion will not supply the omitted facts. "There is no power in a conclusion of this sort to supply any defect in the main body of the allegation." 2 Bish. Crim. Proced., sec. 812. Wharton says, "An allegation in an indictment that certain facts charged were 'to the common nuisance of all the good citizens of the state,' will not make a good indictment for a common nuisance, unless these facts be of such a nature as may justify that conclusion as one of law as well as of fact." Whart. Crim. Law, sec. 2362.

There are some other questions in the case which are ably discussed by the counsel for appellant, such as the necessity of a statutory description of the offence of a nuisance, and whether any such description embraces such facts as are charged in this indictment, but we pass them over as not

Hashagan *v.* Manlove.

being essential to the decision of the cause. We hold the indictment bad, for the reason, if for no other, that it does not aver any facts showing that the public was in any manner affected by the house which the appellant was charged with keeping.

The judgment below is reversed, and the cause remanded, with instructions to the court below to quash the indictment.

W. M. Clapp, F. Prickett, and A. A. Chapin, for appellant.
J. C. Denny, Attorney General, for the State.

HASHAGAN *v.* MANLOVE.

MUTUAL INSURANCE COMPANY.—*Receiver*.—*Assessment*.—*Pleading*.—*Embree v. Shideler*, 36 Ind. 423, adhered to.

APPEAL from the Ripley Circuit Court.

DOWNEY, J.—This was an action by the appellee, as receiver of The Equitable Fire Insurance Company, a mutual insurance company, organized under the laws of the State of Indiana, against the appellant, upon a premium note. In the circuit court there was judgment by default against the appellant.

Among the errors assigned, she alleges that the complaint does not state facts sufficient to constitute a cause of action.

The complaint is liable to the same objections which were held by this court to be fatal objections to the complaint, in *Embree v. Shideler*, 36 Ind. 423.

The judgment is reversed, with costs, and the cause remanded.

G. Durbin, for appellant.

 Pearse *et al.* v. Welborn *et al.*

PEARSE ET AL. v. WELBORN ET AL.

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| 42 | 331 |
| 158 | 149 |
| 42 | 331 |
| 155 | 586 |

PROMISSORY NOTE.—*Individual Signature.*—*Note of Corporation.*—A promissory note was executed in these words:

“\$ 1,000.

MT. VERNON, IND., May 2d, 1868.

“Two years after date, we, the undersigned, worshipful master and wardens of Mt. Vernon Lodge, No. 163, F. & A. M., and trustees of said lodge, for its use, promise to pay to the order,” etc.

[SIGNED.]

“JOHN CONYNGTON, W. M.

“S. H. PEARSE, S. W.

“EDWARD BROWN, J. W.

“G. W. THOMAS, } Trustees.”

“M. W. PEARSE, }

Held, that this was the note of the lodge, and the makers were not personally liable thereon.

APPEAL from the Posey Circuit Court.

BUSKIRK, J.—This is an action by the appellees, as indorsees of the payee, upon the following instrument:

“\$ 1,000.

MT. VERNON, IND., May 2d, 1868.

“Two years after date, we, the undersigned, worshipful master and wardens of Mt. Vernon Lodge, No. 163, F. & A. M., and trustees of said lodge, for its use, promise to pay to the order of Martha A. McDaniel the sum of one thousand dollars for value received, with ten per cent. interest from date, payable semi-annually, without relief from valuation or appraisement laws.

[SIGNED.]

“JOHN CONYNGTON, W. M.

“S. H. PEARSE, S. W.

“EDWARD BROWN, J. W.

“G. W. THOMAS, } Trustees.”

“M. W. PEARSE, }

It is alleged that John Conyngton, Simeon H. Pearse, Edward Brown, George W. Thomas, and Milton W. Pearse subscribed their names to said note, and that the remaining defendants, John A. Mauer, Merritt A. Wier, and William M. McArthur, at the same time, and before the same was delivered to the payee, indorsed the same.

Separate demurrers to the complaint were filed by Simeon H. Pearse, Edward Brown, and Milton W. Pearse, on the

ground that it did not state facts sufficient to constitute a cause of action. The demurrers were overruled, and the defendants excepted.

These defendants then answered separately, and also jointly, setting up that they signed the note as officers of Mt. Vernon Lodge, No. 163, of Free and Accepted Masons; that said lodge was a corporation; that at the time of signing the note the said John Conyngton was the worshipful master, Simeon H. Pearse and Edward Brown were the wardens, and said Milton W. Pearse was one of the trustees of said lodge, duly elected and installed as such officers; that the said note was given to the said Martha A. McDaniel for one thousand dollars borrowed by said lodge of her, and that she took and accepted the note, understanding it to be the note of said lodge, and not the note of the defendants, etc. They also allege that no part of said sum of one thousand dollars ever came to the hands of these defendants, but was paid by said Martha A. McDaniel into the treasury of said lodge, and was by said lodge used in the erection of a building for lodge purposes, etc. But they aver that by accident and mistake the said note was drawn as the note of these defendants and said Thomas and Conyngton, when, in truth and in fact, it was the intention of all the parties to make it the note of said lodge, and not the note of the defendants; that since the execution of said note the said lodge and said Martha A. McDaniel have always treated the note as the note of said lodge, and that said lodge has paid thereon a large sum, to wit, three hundred dollars, received by the payee from the treasurer of said lodge and credited on the back of the note. Among other relief, they pray that the said note may be reformed and treated as the note of the lodge, and not as the note of the defendants, etc.

Demurrers to the paragraphs of the answer, on the ground that they did not state facts sufficient to constitute a good defence to the action, were sustained, and the defendants excepted. Thomas made default. Conyngton and Wier

were not found. Judgment was rendered against Thomas, Simeon H. Pearse, Brown, and Milton W. Pearse. What became of the other defendants, who were served with process, is not shown.

All the judgment defendants join in the assignment of errors, alleging that the court erred in overruling the demurrers to the complaint, and in sustaining those to the answer.

These questions arise in the case: 1. Are the appellants liable on the note as the same appears upon its face? 2. If they are, can they be permitted to show, and have they shown, in their answers, that the note ought to be reformed, so that the lodge will be liable, and they will not be liable, thereon?

We are very clearly of opinion that the note in suit is the note of the lodge, and that the makers and endorsers are not personally liable thereon. This is settled by repeated decisions in this State. The case of *Means v. Swormstedt*, 32 Ind. 87, is directly in point, and is decisive of this case. That was an action upon the following note:

"\$483.00.

MADISON, IND., March 18th, 1868.

"Ninety days after date, we promise to pay to the order of Means, Kyle & Co., four hundred and eighty-three dollars, without any relief from valuation or appraisement laws. Value received. Payable at the National Branch Bank, Madison, Ind.

"WM. B. SWORMSTEDT, Sec'y."

On the lower left hand corner was an impression of a seal, embossed upon the paper of the note, bearing the words, "Neal Manufacturing Company, Madison, Ind."

The court held that the note was the note of the company, and RAY, J., in delivering the opinion of the court, said:

"In *Hovey v. Magill*, 2 Conn. 680, where the defendant, being the agent of a corporation, gave a note, 'I promise,' etc., and signed it, 'A. B., agent of — Company,' SWIFT, C. J., said, 'when an agent, duly authorized, subscribes an

Pearse et al. v. Welborn et al.

engagement, in such manner as to manifest an intent not to bind himself, but to bind the principal; and when, by his subscription, he has actually bound the principal; then it is clear, that the contract cannot be binding on him personally. It will be agreed that no precise form of words is required to be used in the signature; that every word must have an effect, if possible; and that the intention must be collected from the whole instrument taken together. Who can entertain a doubt, upon reading the note in question, that it was the intent of the defendant to bind the company, and not himself?

“And is not the intent equally clear in this case? We know that to hold the letters ‘Sec’y’ as intended to be ‘a description of the person’ would be simply a legal fiction, false in fact. It would simply amount to rejecting the words as surplusage. But this cannot be done, if effect can be given to them upon the face of the paper itself. Most certainly it should never be done against the plain intent of the party who adds the letters to his name for an evident purpose, where that purpose can be collected from the entire instrument, and does not render the paper itself a nullity.”

In the case under consideration, the makers of the note not only added to their names letters which indicated the offices they held, and the characters in which they acted, but in the body of the note the promise is made by them as master, wardens, and trustees of said lodge.

We think the court erred in overruling the demurrer to the complaint.

The conclusion reached renders it unnecessary for us to decide any other question in the case.

The judgment is reversed, with costs, with directions to the court below to grant a new trial and sustain the demurrer to the complaint.

J. & H. C. Pitcher, M. W. Pearse, and Hovey & Menzies,
for appellants.

E. M. Spencer, and W. Loudon, for appellees.

BELL v. THE STATE.

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| 42 | 335 |
| 140 | 90 |

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| 1169 | 75 |

PRACTICE.—Grand Jury.—Impanelling.—Under the act of March 10th, 1873, p. 158, regulating the convening of grand juries, where the record of a criminal action showed that the court met on the 24th of March, 1873, and the grand jury was impanelled on the 2d day of the term, it was presumed that they had been summoned pursuant to an order of the judge or prior to the approval of the act. The act did not prohibit the impanelling of a grand jury previously summoned.

CRIMINAL LAW.—Motion to Quash Indictment.—A motion to quash an indictment cannot prevail unless the defect is apparent on the face of the indictment.

SAME.—Indictment.—Larceny of Property of A. and of B.—An indictment may charge a larceny of A.'s property in one count, and of B.'s in another count, at the same time and place, where the character of the property is such that it may have constituted one offence and a conviction of one might be a bar as to the other.

SAME.—Omission in Verdict.—Motion for a New Trial.—The question as to an omission in a verdict to fix the disqualification of holding an office of trust and profit can not be raised by a motion for a new trial.

APPEAL from the Switzerland Circuit Court.

OSBORN, C. J.—The appellant was indicted, tried, and convicted for grand larceny, in the Switzerland Circuit Court, at its March term, 1873, and, over motions for a new trial and in arrest of judgment, was sentenced in accordance with the verdict. A motion to quash the indictment was also made and overruled. The motions were made at the proper time and in their proper order, and exceptions were also properly taken. A bill of exceptions was filed during the term of the court, setting out the evidence given on the trial.

The errors assigned are :

1. In overruling the motion to quash the indictment.
2. In overruling the motion for a new trial.
3. In overruling the motion in arrest of judgment.

The appellant predicates his motion to quash on two grounds.

1. That the grand jury was not summoned and impanelled according to law.

2. That two offences are improperly included in the indictment.

An act of the General Assembly, approved March 10th, 1873, Acts 1873, p. 158, provides, that no grand jury shall be summoned to appear at any term of a circuit court unless as therein provided. The second section provides, "that whenever the judge of a circuit court shall deem it necessary that a grand jury shall sit in any county of his circuit, it shall be his duty to make an order requiring the clerk to issue a venire for such jury to appear on such day as may be named in the order, and such venire shall be for the jury drawn and selected for the term as is now provided by law; *Provided*, that the grand jury shall be convened at least twice in every year in each county." The objection is, that it does not appear that the grand jury was summoned in pursuance of an order of the judge of the court.

In *Wilson v. The State*, ante, p. 224, this court held that when the clerk has issued a venire for a jury, returnable on a day named, under an act of the General Assembly, approved March 7th, 1873, Acts 1873, p. 103, in the absence of any thing showing the contrary, we would presume that it was issued under an order of the judge. In this case, the record shows that the court met on the 24th of March; that the grand jury was impanelled on the second day of the term; and we must presume that they had been summoned in pursuance of an order of the judge, or that they had been summoned prior to the approval of the act. The act does not prohibit impanelling a jury summoned before its enactment. Its language is, "that hereafter no grand jury shall be summoned to appear at any term of a circuit court unless as provided in this act."

A motion to quash an indictment cannot prevail, unless the defect is apparent on its face. 2 G. & H. 414, sec. 101; *Bellair v. The State*, 6 Blackf. 104; *The State v. Herndon*, 5 Blackf. 75; *The State v. Freeman*, 6 Blackf. 248. In this case the court, on p. 249, says: "A reason given for quashing the indictment was, that there was a defect 'in drawing

and impanelling the grand jury that found the bill.' To have made this reason sufficient, the irregularity in impanelling the jury, should have been made to appear by plea. In this case there was no plea, nor agreement of parties by which the facts were spread upon the record. A motion to quash must be founded upon defects apparent on the record. In this case, the indictment appears regular on its face, and it is not shown how the court became informed of the defect complained of." The authorities are uniform on this question, and we do not consider it necessary to add to those already cited.

The indictment contains two counts, one charging the appellant with stealing a horse, the property of John Warman, the second charging him with stealing a saddle and bridle, the property of John C. Warman. In each count the property alleged to have been stolen is stated to be of the value of more than five dollars. The counsel for the appellant say, that "each count of the indictment contains a charge of a separate and distinct felony, as different as though one was a larceny and the other perjury. The property in the first count is the property of John Warman, and in the second count, the property of John C. Warman, two different persons in the same indictment;" and they cite *McGregor v. The State*, 16 Ind. 9. In that case, it was held, that where separate felonies are charged in one indictment, "if they do not belong to different classes, as murder and forgery, growing out of separate transactions, they may sometimes be joined, without subjecting the indictment to be quashed or the prosecution to be put to an election." And the judge in delivering the opinion remarked that the general proposition, that separate felonies should not be charged in one indictment, had been asserted in two or three cases without the proper qualification. And a quotation is made from 1 Chit. Crim. Law, 253, approving the doctrine that the joinder is a matter of prudence and discretion resting with the judge to exercise. The reason given why two or more felonies

ought not to be joined in the same indictment is stated to be, that the prisoner shall not be confounded in his defence, or prejudiced in his challenge of the jury. *Young v. The King*, 3 T. R. 98. "But," said BULLER, J., on page 106, "these are only matters of prudence and discretion." 1 Chit. Crim. Law, 253; *Griffith v. The State*, 36 Ind. 406.

It is said that an indictment ought not to include a count charging the larceny of property of A. in one count and of B.'s property, at a different time, in another. But we have seen no case holding that because an indictment charged a larceny of A.'s property in one count and a larceny of B.'s property in another, it would be quashed. There is nothing in the indictment showing that the taking of the property was at different times. The time and place are the same in both counts, and the property is of such a character that it might have been taken at the same time, and thus really constitute but one offence, so that a conviction for the larceny of one would operate as a bar to the other. In *Jackson v. The State*, 14 Ind. 327, it was held that the omission, in an indictment for stealing horses, to include saddles and bridles stolen at the same time, was no variance, but that the defendants could not be thereafter prosecuted for stealing them; that the prosecution for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime.

The court committed no error in overruling the motion to quash.

The motion for a new trial is based upon two grounds, the insufficiency of the evidence, and a defective verdict. We have read the evidence, and feel satisfied that it sustains the verdict.

The verdict is supposed to be defective because it omits to disqualify the appellant from holding office. Without deciding whether that is such a defect as he can take advantage of when the verdict is otherwise good, we must overrule the motion for that ground, because the defect cannot be reached by a motion for a new trial. The only way to

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reach it is by a motion for a *venire de novo*. The precise question was decided in *Marcus v. The State*, 26 Ind. 101.

The counsel for the appellant state in their brief, that the same reasons and authorities apply in the motion in arrest of judgment as in the motion for a new trial; and concurring with them, we deem it unnecessary to go over the ground again or to add to what has been already said. *Hoskins v. The State*, 27 Ind. 470. If the court had rendered judgment disqualifying him from holding office, it would have been erroneous. *Wilson v. The State*, 28 Ind. 393.

The judgment of the said Switzerland Circuit Court is affirmed, with costs.

H. A. Downey, and *G. W. Mendell*, for appellant.

J. C. Denny, Attorney General, for the State.

RIEST *v.* THE CITY OF GOSHEN.

CITY.—*Defective Bridge.—Liability for Injury to Persons.—Negligence.—*

Pleading.—Where the complaint in an action against a city alleged that a certain bridge in said city was out of repair, and the planking loose, etc., and that after the plaintiff had driven his horses upon the bridge with a loaded wagon, and was using due and reasonable care on his part to draw forward said load, the horses were injured through the defects in the bridge;

Held, that the complaint was bad on demurrer, because its allegations did not show that the plaintiff used due care in driving upon the bridge, or that he was ignorant of the condition of the bridge, and because there was no general averment that the injury occurred without his fault. If the plaintiff knew of the true condition of the bridge when he drove upon it, there could be no recovery.

Held, also, that the negligence of the city, in not repairing the bridge, did not relieve the plaintiff from the duty of using due care,

APPEAL from the Elkhart Circuit Court.

BUSKIRK, J.—The only error of which the appellant complains is based upon the action of the court in sustaining a demurrer to the complaint. The material averments in the complaint were these:

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| 132 | 14 |
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| 134 | 160 |
| 42 | 339 |
| 138 | 22 |
| 42 | 339 |
| 143 | 428 |
| 49 | 339 |
| 147 | 40 |
| 147 | 330 |
| 42 | 339 |
| 160 | 275 |
| 42 | 339 |
| 165 | 264 |

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That said defendant is a municipal corporation within said county and State, duly incorporated by the name of the city of Goshen; that as such, at the time of the injury hereinafter stated, it had the exclusive management, care, and control of all the streets, alleys, sidewalks, bridges, and public highways within its corporate limits, and was charged with the duty of keeping the same in repair and suitable to be used by all persons desiring to pass on the same, or travel thereon; that on the 4th day of March, 1870, a bridge theretofore erected over what is known as the old channel of the Elkhart river, where the Plymouth road leading from within the said city west to Plymouth, in Marshall county, in the said State, crossed the said channel of the said river, the said road being a public highway and street of said city, and the said bridge forming a part of said highway and street, and being within the corporate limits of said city, was suffered by said city to remain greatly out of repair, in a state of decay and insufficiency for the purpose for which it was erected, and dangerous to all who should pass on the same; the planking thereof being permitted, by said city, to remain loose and insecurely fastened, within the knowledge of said city and its officers; that on the said day the plaintiff by his servant and agent (as he lawfully might do) was passing over, and along said highway, street, and bridge, with his horse-team and wagon laden with staves, of the value of five hundred dollars, that when entering upon the west end of the said bridge, after the said horses had fully gained the same, and being entirely upon it, and while they were making ordinary effort to raise and draw forward the wagon so laden, as aforesaid, upon the said bridge, as aforesaid, within the corporate limits of said city aforesaid, and while using due and reasonable care on his part, the said bridge broke down and gave way; the said planking, from its insecure fastening, being displaced and broken, and precipitated the said horses into the openings so made, and caused them to be held and fastened by the timbers of said bridge, until, by their natural struggles,

during the efforts of the agent of the plaintiff to relieve them therefrom, they were greatly lacerated, bruised, and sprained, and so injured as to be of little or no value, and in all probability will cause their death; that the water of the Elkhart river does not pass through the channel over which the said bridge was erected, but that it does, and for the ten years last past, has passed and now passes through what is known as the new channel, several rods west of said bridge; that for the better description of said bridge, highway, street, and river, and the location of the old and new channels, the plaintiff files herewith a plan and map of the same, and invites reference thereto. Damages were claimed in the sum of three hundred dollars.

To this complaint a demurrer was sustained, and this ruling is assigned for error.

The first objection urged to the complaint is, that it does not sufficiently appear therefrom that the injury, of which the plaintiff complains, was not caused by the fault and negligence of the plaintiff or of his servant. Judge Dillon, in his new and very valuable work on municipal corporations, in speaking of the liability of cities caused by defective bridges or streets, says:

“It is also essential to liability that the plaintiff should have been using reasonable or ordinary care to avoid the accident, or, in other words, he must be free of any such fault or neglect on his part, as will in actions for negligence defeat a recovery.” Dillon *Municipal Corporations*, 918, sec. 789.

The averment must be either expressly made in the complaint, that the injury occurred without the fault or negligence of the plaintiff, or it must clearly appear from the facts which are alleged that such must have been the case. *The E. & C. R. R. Co. v. Dexter*, 24 Ind. 411; *The Michigan, etc., R. R. Co. v. Lantz*, 29 Ind. 528.

It will be observed that it is not alleged that the plaintiff used due and reasonable care to avoid the accident. It is averred that the bridge was suffered to become and remain greatly out of repair, and in a state of decay; that the

Riest v. The City of Goshen.

planking was loose; and that the city and officers knew of the dilapidated condition of the bridge; that while the bridge was in this condition, his servant drove his horse-team and wagon loaded with staves of the value of five hundred dollars upon it; and that during the time that the team was making ordinary efforts to draw forward the wagon so loaded, "and while using due and reasonable care on his part," the bridge broke down, etc. The allegation is, that the servant used due and reasonable care after the team and wagon had gotten upon the bridge, but it is not averred that he used due and reasonable care in driving upon, and attempting to cross the bridge; nor is it alleged that the plaintiff and his servant were ignorant of the true condition of the bridge. If it had been alleged that the injury had occurred without the fault or negligence of the plaintiff, this allegation would have been sufficient, unless it plainly and clearly appeared, from the other facts stated, that the injury had been produced by the fault and negligence of the plaintiff. The allegation of the complaint, that the servant of the plaintiff used due and ordinary care after the team and wagon were upon the bridge, is not equivalent to the allegation that the injury was caused without the fault or negligence of the plaintiff; for the servant of the plaintiff may have been guilty of the grossest carelessness in driving upon the bridge in its decayed and dilapidated condition. The law is well settled, that if the plaintiff or his servant knew of the true condition of the bridge when the team and wagon were driven upon it, he cannot, under such circumstances, recover.

The President, etc., v. Dusouchett, 2 Ind. 586; *The Wayne County Turnpike Co. v. Berry*, 5 Ind. 286; *The Board of Trustees of the W. & E. Canal v. Mayer*, 10 Ind. 400; *The E. & C. R. R. Co. v. Hiatt*, 17 Ind. 102; *The I., P. & C. R. R. Co. v. Kceley's Adm'r*, 23 Ind. 133; *Wood v. Mears*, 12 Ind. 515; *The Jeffersonville R. R. Co. v. Hendricks' Adm'r*, 26 Ind. 228; *Fallon v. City of Boston*, 3 Allen, 38; *Gilman v. Inhabitants of Deerfield*, 15 Gray, 577; *Griffin v. Mayor, etc.*, 9 N. Y.

456; *Munger v. The Tonawanda R. R. Co.*, 4 Comst. 349; *Cobb v. Standish*, 14 Maine, 198; *Coombs v. Purrington*, 42 Maine, 332; *Davenport v. Ruckman*, 37 N. Y. 568; *Beatty v. Gilmore*, 16 Penn. St. 463; *Seward v. The Town of Milford*, 21 Wis. 485; *Weisenberg v. City of Appleton*, 26 Wis. 56; *Murphy v. Deane*, 101 Mass. 455; *Norris v. Litchfield*, 35 N. H. 271; *Lynch v. Smith*, 104 Mass. 52; *Hyde v. Jamaica*, 27 Vt. 443; *Lane v. Crombie*, 12 Pick. 177; *Holbrook v. The Utica, etc., R. R. Co.*, 12 N. Y. 236.

The next position assumed by counsel for appellant is, that the city was guilty of gross neglect in leaving the bridge open and in not notifying the public that it was in an unsafe and dangerous condition, and that such gross negligence would render the city liable, although the plaintiff was guilty of slight negligence in driving upon the bridge; and in support of this position we are referred to the following adjudged cases: *Sweeny v. Old C. & N. R. R. Co.*, 10 Allen, 368; *Elliott v. Pray*, 10 Allen, 378; *Carleton v. Franconia I. & S. Co.*, 99 Mass. 216; *Wendell v. Baxter*, 12 Gray, 494; *Indermaur v. Dames*, Law Rep. 1 C. P. 274; S. C., Law Rep. 2 C. P. 311; *McCullom v. Black Hawk County*, 21 Iowa, 409; *Brown v. Jefferson County*, 16 Iowa, 339; *Silvers v. Nerdlinger*, 30 Ind. 53.

We have examined all the above cases, and will proceed to make a brief review of the points involved and decided. The point decided in the first case referred to was, that, "if a railroad company have made a private crossing over their track, at grade, in a city, and allowed the public to use it as a highway, and stationed a flagman there to prevent persons from undertaking to cross when there is danger, they may be held liable in damages to one who, using due care, is induced to undertake to cross by a signal from the flagman that it is safe, and is injured by a collision which occurs through the flagman's carelessness."

In the above case the company had built the crossing, permitted the public to use it, provided an agent to notify the public when it was safe to cross, and the person injured

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was induced to attempt to cross by the carelessness of the flagman. Yet, under all these circumstances, the company was held to be not liable, unless the plaintiff had used due care to avoid the accident.

The point decided in the second case, *supra*, was, that, "if there are two entrances to a store, and there is a trap-door between one of them and the stairs leading to the upper stories, which are verbally leased to a tenant with permission to use such entrance, the owners, who occupy the lower stories, are bound to use the trap-door with reference to the safety of those who have a right to pass there; and if they neglect to exercise suitable and reasonable precautions to guard against accident while the trap-door is open, they may be held liable in damages to a person having lawful occasion to pass to the upper rooms, who, while in the use of due care, falls through the trap-door and sustains injury by reason of their negligence."

We presume that no one would question the correctness of the ruling in the above case. The owners of the property carelessly left open a trap-door, by means of which the plaintiff fell through and was injured while using due care to avoid the injury.

The question decided in the third case referred to, *supra*, was, that "the owner or occupant of land is liable in damages to those coming to it, using due care, at his invitation or inducement, expressed or implied, on any business to be transacted with or permitted by him, for an injury occasioned by the unsafe condition of the land or of the access to it, which is known to him and not to them, and which he has negligently suffered to exist and has given them no notice of."

The above ruling was unquestionable right. There was negligence on the part of the defendant, whose duty it was to repair or give notice, and the injury occurred without fault on the part of the plaintiff.

The fourth case cited, *supra*, was an action against the proprietors of a wharf, by a person who had been injured through a defect in the wharf, such person having used due care.

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The court held that the defendants were legally bound to exercise (at least) ordinary diligence to keep their wharf safe for those who had a right to pass over it; as an innkeeper is bound to keep the access to his inn, and the passages and apartments in it, safe for those who may wish to enter, or who have entered it legally.

The case of *Indermaur v. Dames*, reported in 1 and 2 Law Reports, *supra*, was an action by a gasfitter against the owner of the premises, where the plaintiff had gone, at the request of such owner, to perform certain work, and who was injured by falling into a hole or shoot, used to raise sugar into the upper stories. The court very properly held the defendant liable, on the grounds that he had invited the plaintiff to come upon his premises; that the defendant had knowledge of the hole and its danger, while the plaintiff was ignorant of the existence of such hole, and was guilty of no carelessness.

The principles of law enunciated in the preceding cases are very clearly right, but we are unable to see their application to the case under consideration.

The Iowa cases were made to turn upon the question, whose duty it was to build and repair bridges. This question has been discussed by counsel in this case, but we do not deem it necessary to consider or decide the question. The point decided in the case of *Silvers v Nerdlinger*, 30 Ind. 53, is, that "the owner of a lot in a city, having, by permission of the city authorities, caused an excavation to be made in a sidewalk along which people are accustomed to pass, for the purpose of constructing an area by the side of a building to be erected on such lot, it is his duty to see that proper protection against injury to persons passing along the sidewalk is provided; and if, in consequence of such excavation being insufficiently guarded, a passer on the sidewalk falls in and is injured, without his own fault, the lot at the time, for the purpose of constructing the area and erecting the building under a contract, being in the exclusive possession of a third person, the contrac-

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tor, who has complied with the stipulations of his contract, the owner is liable for the injury so received."

In none of the above cases was it held that the carelessness of the defendant relieved the plaintiff from exercising due care to avoid the injury.

We can see no error in the action of the court in sustaining the demurrer to the complaint.

The judgment is affirmed, with costs.

W. A. Woods, A. S. Blake, and R. M. Johnson, for appellant.

J. H. Baker, J. A. S. Mitchell, and Wilson & Osborn, for appellee.

O'NEIL v. THE STATE.

CRIMINAL LAW.—*Larceny.—Evidence.—Subsequent Conduct of Party Jointly Indicted.*—When A. was on trial separately, under a joint indictment against him and B., for larceny, it was error in the court to permit the State to prove the conduct of B., subsequent to the alleged commission of the larceny described in the indictment, at a different place, and while the defendant was not present.

APPEAL from the Marion Criminal Circuit Court.

PETTIT, J.—The appellant and one Cushman were jointly indicted for grand larceny in stealing a gold watch-chain of Bingham, of the value of fifty dollars. They chose to separate in their trials, and O'Neil was put on his trial before a jury. He was convicted, sentenced to the State's prison for four years, and to pay a fine of fifty dollars and the costs. A motion for a new trial was made and overruled, and this ruling is the only assignment of error. The only ground, on which the appellant asks a reversal of the judgment is, as he alleges, for the admission of incompetent and illegal testimony over his objection. The State had proved on the

trial that O'Neil and Cushman, indicted with him, on the 25th day of April, 1873, went into the jewelry store of Bingham, the owner of the stolen watch-chain, and asked to look at some watch-chains, which were shown them by a clerk in the house; that the watch-chains were in a tray or box, sitting on the counter, and while they were looking at them the appellant (to use the language of his brief), "by some kind of manipulation got a gold watch-chain into his coat sleeve." While a controversy was going on in reference to a missing watch-chain, it was produced by the appellant; but the appellant and Cushman both indignantly denied any purpose of purloining it; they left the store, going north on Pennsylvania street in this city. Appellant, O'Neil, was arrested and in the station house; the witness, Walke, and chief of police, Thompson, went in search of Cushman. They went to a saloon. Thompson remained out of the house, but witness went in and saw Cushman at the counter or bar. This was proved by a witness named Walke. The State then asked the witness this question: "What did Cushman do when you saw him at the bar or counter of the saloon at the time you speak of?" This question was objected to by appellant, for the reasons, "that the question and the answer proposed to be elicited thereby were irrelevant and immaterial, and tended to prejudice the defence of the defendant; and for the further reason that the defendant was not present, and that the place was different from, and the time subsequent to, the commission of the alleged larceny."

The objection was overruled and exception taken, and the witness answered, "that when Cushman saw him, witness, in the saloon at the time mentioned, he started to run out the back way of the saloon, and had taken several paces when he was caught and put under arrest by chief Thompson, and was taken to the store to be identified as the man who was with the defendant."

One of the reasons filed for a new trial was, "that the court erred in permitting the State to prove the conduct of

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James Cushman, jointly indicted with the defendant, after and subsequent to the commission of the alleged offence and larceny described in the indictment, when the defendant was not present." O'Neil alone was on trial, and the action of Cushman at his arrest was after the larceny (if any had been committed), and when O'Neil was not present, but was confined in jail.

We cannot see the legality of this evidence to convict O'Neil, but we can see how it might prejudice his cause, by showing that the man with whom he was seen in the store, on being approached and discovered by a clerk in the store of Bingham and a police officer, feeling the sting of guilt on himself, attempted to escape, and thereby created the impression that O'Neil was guilty, because he had been seen in a store with a man who shunned and tried to avoid detection and arrest. We hold that the admission of this evidence was an error for which the judgment must be reversed.

This ruling is fully sustained and justified by 1 Greenl. Ev., secs. 110, 111; Whart. Crim. Law, secs. 703, 705; *Galloway v. The State*, 29 Ind. 442; 2 Bishop Crim. Proced., sec. 191. There were other causes for a new trial, but they either have no existence in fact, or are so imperfectly stated that we cannot consider them.

The judgment is reversed, with instructions to the court below to grant the motion for a new trial; and the clerk of this court is directed to issue the proper order for the return of the prisoner.

W. W. Leathers, for appellant.

R. P. Parker and *J. C. Denny*, Attorney General, for the State.

GRAY ET AL. v. BAILEY ET AL.

WILL.—Residuary Legatees.—Lapsed and Adeemed Legacy.—Where five daughters were residuary legatees of the personal estate of their father, and one of them died, and three of the others gave receipts to their father for a sum of money in full of all their interest in the estate; the remaining daughter, the one legacy having lapsed and the three others having been thus adeemed in the lifetime of the testator, was entitled to the residue of the personal estate.

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APPEAL from the Jefferson Common Pleas.

WORDEN, J.—Amanda P. Bailey, who was a daughter of Joshua Tull, deceased, hereinafter mentioned, together with her husband, Howard Bailey, filed her petition in the court below against the heirs, legatees, and executor of the last will of said Joshua Tull, praying that the residue of the personal estate of said Joshua, in the hands of the executor for distribution, after paying the debts, etc., be paid over to her, and on the hearing of the cause it was ordered accordingly. The defendants, the heirs, etc., appeal.

The following are the facts in the case as disclosed by the evidence: On March 5th, 1849, the said Joshua Tull made his last will and testament, devising his real estate to his sons, and his personalty to his daughters. The following clause in the will is the only one that needs to be specially considered, viz.:

“In the fifth place, I give and bequeath unto my five daughters, Eleanor M. Tull, Jane Gray Wiley, Matilda Ann Tull, Elizabeth E. Gray, Amanda P. Bailey, all and singular my personal property of every kind. My will is, that my daughters, in the distribution of what I have given them, all be made equal from first to last.”

Matilda Ann died without issue before the death of the testator. The testator died September 30th, 1865. Before his death, he advanced to his three daughters, Elizabeth, Eleanor, and Jane, each the sum of two hundred and fifty dollars, and took from each a receipt therefor. The receipts

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were all substantially alike, bearing the same date. We copy one as sufficient to show the substance of all:

"Received of Joshua Tull, Sr., two hundred and fifty dollars, July 17th, 1854, it being in full of all my interest in the estate of Joshua Tull, Sr., both real estate and personal property.

[SIGNED.]

"ELEANOR M. TULL."

It was proved by John Chambers, the executor, that the testator, after the execution of the will, and a short time before his death, told the witness that he wanted to make all his children equal; that he had given to Elizabeth Gray, Eleanor M. Tull, and Jane Wiley two hundred and fifty dollars each, which was their share of his estate, and that he wanted him, the witness, to pay to the plaintiff, Amanda P. Bailey, two hundred and fifty dollars, to make her equal with the others, and to give the balance to his (the testator's) wife, now deceased. He also said he had offered to give Amanda the same amount which he had given to the other daughters, but she said she did not wish to take it, as her husband was reckless and might squander it, and she would rather let it remain where it was.

The executor has paid to said Amanda the sum of two hundred and fifty dollars, and there remained, after paying debts and costs, about one hundred and seventy-five dollars.

The question arises whether upon the facts shown, the appellee, Amanda P. Bailey, was entitled to the residue of the money. We are of opinion that she was, and, consequently, that no error was committed by the court below in awarding it to her.

Upon the death of Matilda Ann without issue, before the death of the testator, the bequest to her lapsed. 1 Jarman Wills, 4 Am. ed., 310-11, and note; 2 G. & H. 554, sec. 13. The bequest to the five daughters was substantially a residuary bequest. They were substantially residuary legatees, as they were to take all the personal property of the testator of every kind, be it much or little, after the pay-

ment of debts. The personal property was the primary fund for the payment of debts, and the legatees could only take what might be left after the debts of the testator were paid.

The share which otherwise would have gone to Matilda Ann, by her death without issue before the death of the testator, lapsed into the residuum, and would have gone to the remaining four legatees had nothing occurred to prevent either from taking her share thereof. 1 Jarman Wills 312, and note; 2 Redfield Wills 116, 117, 126; *Prescott v. Prescott*, 7 Met: 141.

The receipt, by each of three daughters, of the sum of two hundred and fifty dollars from the testator in his lifetime, and the execution by them respectively of the receipts therefor, operate as a full and complete satisfaction or ademption of their respective legacies. This is not left to implication, or presumption but is clearly and unequivocally expressed on the face of the receipts. Herein the case differs from *Clendening v. Clymer*, 17 Ind. 155, cited by counsel for the appellants. In that case, it was held that the doctrine of presumed or constructive ademption, such as arises from an advancement to a child by a parent, or one standing *in loco parentis*, of a sum equal to the legacy, has no application to residuary legacies. In the case before us nothing is left to presumption. The papers signed by the three daughters speak in clear and decisive terms, and show that they received the money in full of their interest in the estate.

One of the legacies having thus lapsed, and the three others having been thus adeemed in the lifetime of the testator, it follows that, under the will, Amanda, the only other one of the five daughters named in the will, is entitled to the residue of the personal estate. It is objected that this is unjust and improper, as contradicting the terms of the will, which expresses the intention of the testator that the several daughters should "all be made equal from first to last." We are of opinion, however, that it is eminently just and proper that Amanda should receive such resi-

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due. The provision alluded to in the will has reference to what the testator had bequeathed his daughters by the will, and would seem to have no other effect than to declare that the property thus bequeathed should be distributed equally among them.

By the terms of the will the property was to be shared equally between the daughters. But in 1854, when the legacies of the three daughters were adeemed, it was uncertain how long the testator would live, or how much personal property, if any, he would have at the time of his death. The three daughters preferred to take each the sum of two hundred and fifty dollars at that time, rather than await the death of the testator and then take their respective shares under the will. They then took a certainty for an uncertainty, inasmuch as the testator might have died without personal property. Had he died without personal property, or without enough to make the share of Amanda equal to what had been thus advanced to each of the other three, she would have had no remedy. The daughters who chose to take their shares in the lifetime of the testator, in the manner above stated, could not have been compelled to contribute to her any part of that which they thus received; nor can they, on the other hand, claim any of the share that thus comes to her under the will, although it exceeds the amount which they each received. They each made their election to take the two hundred and fifty dollars in the lifetime of the testator in ademption of the legacies provided for them by the will, thus leaving Amanda to her chances of receiving more or less than the amount which they each received, and by that election they must be bound.

The parol statements of the testator to the executor as to the disposition he wished made of the residue, after paying Amanda her two hundred and fifty dollars, cannot, of course, control the disposition made by the will.

The judgment below is affirmed, with costs.

H. W. Harrington, C. A. Korbly, J. Y. Allison, and W. T. Friedley, for appellants.

The State, *ex rel.* Ford, *v.* The Kankakee Valley Draining Co.

THE STATE, EX REL. FORD, *v.* THE KANKAKEE VALLEY
DRAINING COMPANY.

JURISDICTION.—*Court of Common Pleas.*—*Quo Warranto.*—The court of common pleas had jurisdiction to hear and determine an action in the nature of a *quo warranto*, and the information in such case might be filed by the district attorney.

APPEAL from the La Porte Common Pleas.

WORDEN, J.—This was an information brought by the appellant against the appellee, in the nature of a *quo warranto*, the object of which was to obtain a judgment declaring the corporate existence of the defendant dissolved, etc. Demurrers were filed to the information, but these, before being passed upon, were withdrawn, and on motion of the defendant the action was dismissed, apparently on the ground either that the court had not jurisdiction of the subject of the action, or that it could not be brought upon the relation of the district attorney of the common pleas district. The appellant excepted.

As the statute on the subject of information originally stood, it was, perhaps, contemplated that proceedings should be had under it in the circuit court only, and hence it was provided, that the information might be filed by the prosecuting attorney in the circuit court of the proper county, upon his own relation, whenever he should deem it his duty to do so, or when he should be directed by the court or other competent authority to do so. 2 G. & H. 323, sec. 750. But in the case of *Gass v. The State, ex rel. Clark*, 34 Ind. 425, it was held that a later statute, 2 G. & H. 22, extended the jurisdiction of the court of common pleas to cases of this description. There is another case, that of *Yonkey v. The State, etc.*, 27 Ind. 236, which was overlooked at the time the case in 34 Ind. was decided, that clearly sustains the jurisdiction of the common pleas. The case originated in the common pleas, but was reversed in this court and remanded for a new trial. The question of jurisdiction does

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not seem to have been made, although the case was closely contested; but this court must have been of opinion that the common pleas had jurisdiction, otherwise the cause would not have been remanded to that court for a new trial therein.

The court of common pleas having jurisdiction, we think it necessarily follows that the information may be filed in that court by the district attorney, in the same manner as it might be filed by the prosecuting attorney in the circuit court. It is the duty of the prosecuting attorney to prosecute the pleas of the State in the circuit courts of his circuit, and of the district attorney to prosecute the pleas of the State in the courts of common pleas of his district. 2 G. & H. 431, sec. 1.

We have not examined any question as to the sufficiency of the facts stated in the information, as no such question arises on the motion to dismiss.

We are of opinion that the court erred in dismissing the action.

The judgment below dismissing the action is reversed, with costs, and the cause remanded for further proceedings.

OSBORN, C. J., did not participate in the decision of this cause.

W. H. Calkins, for appellant.

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CRIMINAL LAW.—*Placing Obstruction on Railroad.—Evidence.*—Under an indictment for maliciously placing pieces of timber upon a railroad track, it is not necessary that the proof should correspond with the allegation as to the number of pieces placed upon the track. One piece calculated to obstruct passing trains is sufficient to constitute the offence.

SAME.—*Presumption.*—On the trial of such an indictment, an instruction, that, “if the proof shows conclusively that the defendant placed the timber

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upon the track of the railroad in question, in such a manner as to obstruct the passage of trains of cars over said road, the presumption is that the act was wilfully and maliciously done," it was held, was erroneous.

APPEAL from the Clinton Circuit Court.

DOWNEY, J.—This was an indictment against the appellant and one Lacey, in which it is charged that they did, on the twenty-seventh day of December, 1872, at the county of Clinton, and State of Indiana, feloniously, wilfully, and maliciously place upon the track of the Logansport, Crawfordsville, and South-western Railroad, in that county, certain obstructions, to wit, several pieces and large logs of timber, projecting above the track six inches each, in such manner as to obstruct and endanger the passage of engines, carriages, and trains of cars, then and there using the road, and did thereby, then and there, feloniously, wilfully, and maliciously obstruct the passage of the said engines, carriages, and trains of cars upon said railroad track, contrary to the form of the statute, etc.

The defendants, on arraignment, pleaded not guilty, and elected to be tried separately. The appellant upon a trial by jury was found guilty, and he made a motion for a new trial, for the reasons, and on the grounds, that the court had erred in giving to the jury instructions numbered six, seven, and eight, in the series of instructions given by the court to the jury. This motion was overruled by the court; the defendant excepted, and was sentenced to the punishment fixed by the jury in their verdict.

The only error properly assigned is the overruling of the motion for a new trial.

The evidence is not in the record, and we must, therefore, regard the instructions in question as correct, if, upon any evidence which might legally have been introduced under the issue, they would have been proper.

The sixth instruction is as follows: "It is not necessary that the proof should correspond with the allegation as to the number of pieces of timber placed upon the track. If the proof shows that one piece of timber was placed upon the

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track of said road, in such a manner as to obstruct the passage of cars over said road, it will be sufficient upon that point."

There is no valid objection to this instruction. It is not necessary to prove all that is alleged in an indictment, provided that what is proved constitutes a crime punishable by law, of the same nature or quality as that which is charged. It is a crime wilfully and maliciously to place any obstruction upon the track of any railroad, so as to endanger the passage of trains. 2 G. & H. 446, sec. 29. Placing a single piece of timber upon the track of a railroad, would constitute such obstruction, and the fact that the indictment charged that several were placed upon it, and that the State proved that one only was placed upon it, is no variance nor failure of proof.

The seventh instruction is as follows:

"If the proof shows conclusively that the defendant placed the timbers upon the track of the railroad in question, in such a manner as to obstruct the passage of trains of cars over said road, the rule of law is, that every man intends the necessary consequences of his acts, and the presumption is, that the act was wilfully and maliciously done."

This charge may be abbreviated by leaving out the words, "the rule of law is that every man intends the necessary consequences of his acts," which are not necessary to a proper understanding of it. It will then read as follows: "If the proof shows conclusively that the defendant placed the timbers upon the track of the railroad in question, in such a manner as to obstruct the passage of trains of cars over said road, the presumption is that the act was wilfully and maliciously done." What is a presumption? Starkie says: "Where the connection between facts is so constant and uniform that from the existence of the one that of the other may be immediately inferred, either with certainty, or with a greater or less degree of probability, the inference is properly termed a presumption, in contradistinction to a conclusion derived from circumstances by the united aid of

experience and reason." 1 Stark. Ev. 80. It is "an inference affirmative or disaffirmative of the existence of a disputed fact, drawn by a judicial tribunal, by a process of probable reasoning, from some one or more matters of fact, either admitted in the cause or otherwise satisfactorily established. Best Presump. 12;" Bouv. Dic., vol. 2, p. 367.

Presumptions are either presumptions of law or presumptions of fact. Presumptions of law are either conclusive or they are disputable. They are rules which, in certain cases, either forbid or dispense with any ulterior inquiry; inferences or positions established, for the most part, by the common, but occasionally by the statute law, which are obligatory alike on judges and juries. Presumptions of fact, on the contrary, are inferences as to the existence of some fact drawn from the existence of some other fact; inferences which common sense draws from circumstances usually occurring in such cases. These presumptions can only be made by a jury, or by the court when acting as a jury in the trial of issues of fact. Bouv. Dic., Title Presumption. In the charge under consideration, the court told the jury that upon the proof of one fact, that is, the placing of the timbers on the track so as to obstruct the passage of trains, the presumption is, that the act was wilfully and maliciously done. Had the court said, that upon proof that the timbers were wilfully placed on the track, the jury might infer malice, a different question would have been presented. The court did not state to the jury whether the presumption was one of law or one of fact; whether it was conclusive or disputable; whether they had any thing to decide, with reference to its application, or whether they were compelled to apply it at all events. There are many circumstances under which the defendant might have placed the timbers on the railroad track, so as to obstruct the passage of trains, which would have precluded the idea of its having been done wilfully and maliciously. It seems to us that the court should not have given this charge in the form in which it was given. We can not conceive of any state of the evi-

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dence which would have justified the giving of it. We suppose it proper for the court to state to the jury a legal presumption for their government, informing them, if it is an indisputable presumption, that they must be governed by it, or if it be a disputable presumption, that it is to stand good until the contrary is established by the evidence, or by a counter presumption. But we cannot think that it is either proper or safe for the court to so far invade the province of the jury, as to direct them when they shall make or apply a mere presumption of fact. When the trial of a criminal case is by jury, the court should not lay down any arbitrary rules as to the weight they are to give to the evidence which has been adduced. They are the judges of the facts, and must be left to weigh the evidence and consider the motives of the party without any rules from the court, which will compel them to indulge a presumption of fact, whether, under all the circumstances, they think they ought to indulge it or not.

We have examined the eighth instruction, on the subject of the degree of certainty which is required in criminal cases to warrant a conviction, and think it is not objectionable

The judgment is reversed, and the cause remanded, for a new trial. The clerk will certify to the warden of the prison to return the appellant to the jail of the proper county.

PETTIT, J., dissents from so much of the foregoing opinion as relates to the seventh instruction.

J. Claybaugh, R. P. Davidson, J. C. Davidson, and ——— Thompson, for appellant.

J. C. Denny, Attorney General, for the State.

Reeves v. Allen.

REEVES v. ALLEN.

DEPOSITION.—*Proceedings before Mayor.*—Depositions of witnesses may be taken out of the State, in an action pending before the mayor of a city.

APPEAL from the Putnam Common Pleas.

DOWNEY, J.—The only question in this case is, whether or not depositions of witnesses may be taken out of the State, in an action pending before the mayor of a city, who, by law, has the jurisdiction and powers of a justice of the peace. The common pleas decided that they could not be taken. We are of the opinion that this decision cannot be maintained. Prof. Greenleaf says: "This method of obtaining testimony from witnesses, in a foreign country, has always been familiar in the courts of admiralty; but it is also deemed to be within the inherent powers of all courts of justice." 1 Greenl. Ev., sec. 320.

But however this may be, we think the question in this State is settled by statute. It is enacted, in sec. 49, p. 591, 2 G. & H., that "depositions of witnesses or parties residing out of the county, or sick, or about to leave the same, may be taken under the rules prescribed by law for taking depositions; and if such party or witness be absent from the county or unable to attend at the trial, may be read as evidence in any cause; and no dedimus shall be necessary in such case." The question, whether a dedimus or commission is necessary when the deposition is taken out of the State, is not before us in this case, and need not be decided, for there was a dedimus or commission issued by the mayor, in pursuance of which the deposition was taken.

The judgment is reversed, with costs, and the cause remanded, with instructions to grant a new trial, to overrule the motion to suppress the deposition on the ground stated, and for further proceedings.

S. Turman and J. Birch, for appellant.

D. E. Williamson and A. Daggy, for appellee.

Kellogg v. Price et al.

KELLOGG v. PRICE ET AL.

DRAINING ASSOCIATION.—Appraisers.—Appeal.—Practice.—Demurrer.—An order of the board of county commissioners appointing three appraisers to view a proposed ditch and assess benefits and damages, need not show affirmatively that the persons so appointed are “disinterested freeholders of the county in which the application is made and not of kin to any of the parties.” The question as to their having such qualifications may arise on the trial on appeal, but cannot be raised by demurrer.

SAME.—Practice.—Appeal.—Pleading.—Jury.—Upon an appeal there should be no demurrers to the transcript, no answers, and no replies. Nor, of necessity, should there be a re-appraisement, though the court would, perhaps, when necessary, have power to appoint new appraisers or re-appoint the old, and generally to examine the sufficiency and regularity of the steps taken. If they have been sufficient and regular, the proceedings should be affirmed, if not, reversed and corrected, and in a proper case a jury may be had on demand of either party.

APPEAL from the Howard Common Pleas.

DOWNEY, J.—This was a proceeding under the draining law of March 11th, 1867, 3 Ind. Stat. 228, commenced by the filing of a petition by the appellant before the board of commissioners of Howard county. So far as we have been able to discover, the petition contains all the requisites of the statute on the subject. The board of commissioners appointed three appraisers “to view the proposed ditch and assess the benefits and damages according to law;” but the order of the the board does not show affirmatively that the persons so appointed were “disinterested freeholders of the county in which the application is made, and not of kin to any of the parties,” as the statute requires them to be. A notice was published to the land-owners as required by section three of the act, which, with the proof of its publication, is in the transcript.

The appraisers made and filed their appraisement of the benefits, stating that no land was damaged by the construction of the drain. Thereupon, the appellees appealed to the common pleas, by filing bond with the clerk of the common pleas, as authorized by the eleventh section of said act.

In the common pleas, the appellees filed an answer con-

sisting of three paragraphs, to which there was a demurrer, which was sustained as to the third paragraph and overruled as to the first and second. To the first and second paragraphs the appellant replied by general denial.

It having been stated in the appeal bond that John Rich had succeeded to the rights of Kellogg in the assessment, the appeal seems to have been docketed in the common pleas in his name, instead of that of Kellogg. This mistake was, on his motion, with the consent of Kellogg, corrected by order of the court.

Whereupon the appellees demurred to the cause of action, consisting, as the record says, of the application and record proceedings therein, and for ground of demurrer say, that they do not state facts sufficient to constitute a cause of action, nor do they state facts sufficient to give the plaintiff any right or remedy in this proceeding whatever. The common pleas sustained this demurrer and rendered judgment for the appellees. The appellant excepted, appealed, and has assigned the ruling as error in this court.

The appellees have not filed any brief in this court, and we are therefore in the dark so far as their views are concerned. The section of the act allowing an appeal is as follows: "Any person aggrieved by the proceedings of said appraisers may appeal the same to the court of common pleas of the county, upon giving bond and within the time, as in cases of appeal from justices of the peace, except that said bond shall be filed with the clerk of said court." The bond must be given as in cases of appeal from justices of the peace, and it must be given within the time specified in such cases. The bond, instead of being filed in the court from which the appeal is taken, must in this case be filed in the common pleas, the court to which the appeal is taken. Here the statute stops. How the case is to be conducted and disposed of in the common pleas is not provided. We cannot think, however, that it was intended that there should be demurrers to the transcript, or answers or replies in the common pleas, nor that it was intended that there should,

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of necessity or as a matter of course, be a re-assessment of the benefits and damages, though perhaps the common pleas would, when necessary, have the power to appoint new appraisers or re-appoint the former ones to make a re-appraisement in whole or in part of the lands benefited or damaged. We suppose that the common pleas should on such appeal examine and determine whether the steps required by the statute had been regularly taken, by filing the proper petition, appointing qualified appraisers, giving the required notice, and making and reporting the assessment, etc. If such steps have all been regularly taken, and no question is made as to the amount of the assessment, the proceeding should be affirmed. If not thus regular, it should be reversed and disposed of as the circumstances may require. If the amount of the damages is questioned, other appraisers may be appointed, or a jury trial may be had on the demand of either or both of the parties.

We are informed by counsel for the appellant, that the demurrer was sustained on the ground that the order of the board of commissioners did not affirmatively show that the appraisers possessed the qualifications required by the statute. We think if this was the ground, that the ruling was not correct. They may have possessed all the requirements enumerated in the statute. Whether they did or not was a question for the court on the trial of the cause, and did not, we think, properly arise on demurrer to the transcript. This proceeding is somewhat similar to the statutory proceeding to lay out and change highways, and some light may be derived from the cases which have been decided under that statute. On this subject, see *Daggy v. Coats*, 19 Ind. 259; *Brown v. McCord*, 20 Ind. 270. In the last named case it was held that a petition for the location of a highway need not affirmatively show that the petitioners were freeholders, or that six of them resided in the immediate neighborhood of the contemplated highway; and that such facts might be proved

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on the hearing, although not alleged. We think the judgment of the common pleas ought to be reversed.

The judgment is reversed, with costs, and the cause remanded, with instructions to overrule and set aside the demurrer, strike out the answer and reply, and proceed according to this opinion.

N. P. Richmond, and *C. E. Hendry*, for appellant.

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SPECIAL FINDING.—*Signature of Judge.*—*Bill of Exceptions.*—When the court, at the request of a party, states the facts in writing, and then the conclusions of the law upon them, under section 341 of the code, and this special finding is not signed by the judge or incorporated in a bill of exceptions, the Supreme Court will not review the decision of the lower court upon the questions of law involved in the trial.

APPEAL from the Knox Circuit Court.

OSBORN, C. J.—The issue in this case was tried by the court. At the request of the parties, the court made a special finding of the facts and conclusions of law arising thereon.

The appellant has submitted a very able brief in the case, but the appellee makes the point that the special finding is not signed by the judge or incorporated in a bill of exceptions, and under the uniform ruling of this court, it is not before us, so as to warrant us in reviewing his decision on the questions of law arising in the case. *The Peoria, etc., Company v. Walser*, 22 Ind. 73; *Roberts v. Smith*, 34 Ind. 550.

The errors assigned are all based upon the special finding, and, as that is not before us for review, there is no available error in the case.

The judgment is affirmed, with costs.

D. F. Embree and *O. M. Welborn*, for appellant.

F. W. Viehe, for appellee.

Spencer v. Woollen *et al.*

SPENCER v. WOOLLEN ET AL.

PRACTICE.—Pleading.—Striking out Paragraph.—It is not error for the court, on motion, to strike out a paragraph of a pleading, when the evidence admissible under it may be introduced under a remaining paragraph.

SAME.—Inspection of Papers.—Motion.—A motion to require the opposite party to produce a paper for inspection should show its contents, that the court may determine its relevancy.

APPEAL from the Jennings Circuit Court.

PERTIT, J.—This suit was brought by the appellees against the appellant, on a note payable at a bank in this State to the order of D. C. Sullivan, and by him endorsed and assigned to the plaintiffs below, appellees here. Issues were formed, trial by the court, finding and judgment for the plaintiffs for the amount of the note. The case is awkwardly presented here, the plaintiffs below being placed as appellants, and the defendant below being placed as appellee, when the reverse should be their position; the defendant below having been beaten, and having appealed to this court, his name should appear in the assignment of errors as the appellant, and his adversaries as appellees; but we have made the correction in stating the case above.

The answer was in six paragraphs. A motion to strike out the sixth paragraph was sustained, because it was the same, in substance, as the fifth paragraph of the answer, and that all the evidence that could be given under the sixth, might be given under the fifth paragraph of the answer. The errors assigned are, first, "the striking out the sixth paragraph of the answer; second, overruling a motion of defendant to require plaintiffs to produce for inspection, and upon the trial, a certain letter referred to in the bill of exceptions." We have examined all the paragraphs of the answer, and are clearly of the opinion that all the evidence that could be given under the sixth was properly admissible under the fifth paragraph. The fifth paragraph sets out with great certainty the facts and circumstances to constitute a fraud in procuring the note to be given, and avers that

the plaintiffs had full notice of these facts and circumstances before they took the assignment, but does not use the words fraud, cheat, fraudulently, and to deceive, while the sixth paragraph uses these terms, which were not necessary, if the facts stated, as in the fifth paragraph, showed fraud and cheating in procuring the note to be given.

It follows that no error was committed in striking out the sixth paragraph of the answer.

As to the second assignment of error, we have only to say, that the motion to produce the letter does not show what its contents were, and the court could not see that it was material to the defence. 2 G. & H. 191, sec. 306.

We entertain no doubt, from the whole record, that the rights of the parties have been properly determined.

The judgment below is affirmed, at the costs of the appellant.

J. D. New and *J. E. McClelland*, for appellant.

J. Overmeyer and *D. Overmeyer*, for appellees.

MORSE ET AL. v. MORSE.

WILL.—Posthumous Child.—Revocation of Will.—Jurisdiction of Court of Common Pleas.—In a proceeding in the court of common pleas to have a will declared revoked by the birth of a posthumous child, for whom no provision had been made, no question as to the jurisdiction of the court could be made on the ground that the title to real estate might be affected thereby.

SAME.—Party Plaintiff.—Such an action may be brought by the posthumous child, or by any one interested, although there be others having a common interest who are not joined.

SAME.—Descent.—The birth of such a child, without provision for it in the will, revokes the will; and while such a child lives, the will is to be deemed revoked, and the property of the decedent must descend according to our statute of descents applicable to cases of intestacy.

APPEAL from the Steuben Common Pleas.

BUSKIRK, J.—It appears of record that Thomas B. Morse,

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on the 31st day of March, 1872, executed his will, and on that day departed this life, leaving a widow and three children him surviving; that by such will he devised and bequeathed real and personal estate to his widow, children, brothers, sisters, and two churches therein named; that subsequent to his death, his will was duly admitted to probate, and that the persons therein named as executors qualified and entered upon the discharge of their duties as such; that on the 9th day of September, 1870, a posthumous child was born to such testator, for whom no provision was made in the said will; that such child was legitimate and was alive at the commencement of this action; for which cause it was asked that the probate of said will should be revoked; that such will should be decreed to be revoked and held for naught, and that the estate of the said decedent should be settled under the statute as though he had died intestate.

The proceeding was instituted by the appellee, who was the son and legatee of the said decedent. The executors and all other persons who were named as devisees or legatees in the will were made defendants.

The defendants moved to dismiss the action for the want of jurisdiction on the part of the court below, upon the ground that the title to real estate was in issue. The motion was overruled and an exception taken.

There was a demurrer to the complaint, for the want of sufficient facts and a defect of parties, which was overruled and an exception taken.

Marcus F. Morse answered separately, as follows: "The defendant, Marcus F. Morse, for separate answer to said complaint, says:

" 1. That he is a legatee in the last will of Thomas B. Morse, deceased, and is willing and desirous that said posthumous child shall have its full inheritance, and prays all other and equitable relief."

Each of the other persons named in the will as devisees

or legatees, except the widow and children of decedent, filed a similar answer to the one above.

A demurrer was sustained to each and all of such answers, and exceptions taken.

The executors answered jointly, in which they averred the execution of the will, the death of the testator, their appointment as executors, the probate of the will, their qualification as such executors, and what acts they had performed as such, and the birth of the posthumous child. The answer then proceeds as follows:

"They further show that before the birth of said posthumous child, estates in land and property in personalty vested in the legatees in said will named. They further say that after the birth of said child they desired that it should have its full inheritance of the estate of the said decedent, Thomas B. Morse, and intended it should have it, believing it was entitled to the same.

"They therefore pray this court to direct by decree, what execution of the will or administration of the estate should be made, and they pray all proper relief."

A demurrer was sustained to the above answer and an exception taken.

The defendants refusing to answer further, final judgment was rendered revoking the probate of said will and setting the same aside as void and appointing an administrator to settle the said estate.

The widow and children of the decedent refused to appeal. The appeal is taken by the other legatees and the executors.

There was due notice and summons. The case is properly here.

The first question presented for our decision is, whether the court below had jurisdiction of this action. There seems to be no room to entertain a doubt upon the subject. The title to real estate was not in issue. The real question involved was, whether the will had been revoked by posthumous issue, and while the decision of that question might affect the ultimate rights of devisees in and to the real estate devised by

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such will, this did not put in issue the title to real estate or oust the jurisdiction of the court. *Carpenter v. Vanscoten*, 20 Ind. 50; *Wolcott v. Wigton*, 7 Ind. 44; *Holliday v. Spencer*, 7 Ind. 632; *Dixon v. Hill*, 8 Ind. 147.

Besides, the statute expressly confers upon the common pleas court the sole and exclusive original jurisdiction to hear and determine all cases to contest the validity of a will or to revoke the probate thereof. Sec. 39, 2 G. & H. 559. No other court has any jurisdiction of such actions. Even the right of appeal to the circuit court, where the case was tried *de novo*, has been taken away. See Acts Special Session, 1865, p. 183; 3 Ind. Stat. 558.

The court committed no error in overruling the motion to dismiss.

Did the court err in overruling the demurrer to the complaint?

We think the complaint was good. Upon the facts stated, the plaintiff was entitled to have the will revoked. *Hughes v. Hughes*, 37 Ind. 183.

The posthumous child might have brought the action alone or jointly with the appellee, but it was neither a proper nor necessary party defendant. Under our statute an action to contest the validity of a will or to set aside the probate thereof may be brought by one person, although there may be other persons, having a common interest, who are not joined, and none are to be made defendants but the executor and those who are beneficially interested in the will; and we think that by the phrase, "all other persons beneficially interested," were meant the devisees and legatees named in the will or those claiming under them. The posthumous child was not beneficially interested in the will, for, if it had been, there would have been some provision made for it, and the will would have been valid. Sec. 39, 2 G. & H. 559.

It is conceded by counsel for appellants, that there was no error in sustaining the demurrers to the separate answers of the legatees.

But it is earnestly claimed by counsel for the appellants,

that the court erred in sustaining the demurrer to the joint answer of the executors.

The position assumed is, that the will was valid at the death of the testator; that it spoke and took effect from his death; that it vested in the devisees and legatees the right to the land devised and the personal property bequeathed; that the rights thus vested cannot be divested by the birth of posthumous issue; and that under section 4 of the statute of wills, these rights will remain in abeyance until it is ascertained whether such child dies without issue.

The question presented renders it necessary for us to place a construction upon sections 3 and 4 of our statute of wills, which read as follows:

“Sec. 3. If after the making of a will, the testator shall have born to him legitimate issue who shall survive him, or who shall have posthumous issue, then such will shall be deemed revoked, unless provision shall have been made in such will for such issue.

“Sec. 4. But in case such child dies without issue, and the wife of such testator be living, the estate of the testator, except the wife's interest therein, shall descend according to the terms of the will; and in case of the death of the wife, and also of the child, without issue, the whole of such estate shall descend as directed in the will, unless such child have a wife living at his death, in which case such wife shall hold such estate to her use so long as she remains unmarried.”
2 G. & H. 552.

This court held, in *Hughes v. Hughes*, 37 Ind. 183, that the birth of a child after the making of the will, without any provision being made in such will for such child, worked an absolute revocation of the will. The same rule would apply to the birth of a posthumous child.

We are now asked to hold that under section 4 the will is not absolutely revoked, but that the whole matter is held in abeyance until the death of the child without issue.

It is quite clear to us that upon the record in this cause,
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no question arises which requires us to determine what would be the effect of the death of the posthumous child without issue. By the third section, the birth of the child, without any provision having been made therefor in the will, revoked the will. By the fourth section certain provisions are made in reference to the descent of the property of the testator in case such child dies without issue. The record shows that the child is living, and while it continues to live the will is to be deemed revoked, and the property of the decedent must descend according to our statute of descents in case of intestacy.

We therefore withhold any opinion as to the proper construction of section 4, except that the will and property of the testator are not held in abeyance until the happening of the contingency provided for in such section.

The judgment is affirmed, with costs.

D. E. Palmer, for appellants.

Best & McClellan, for appellee.

JOSEPH v. THE STATE.

CRIMINAL LAW.—*Keeping Disorderly House.—Information.*—Where an information for keeping a disorderly house followed more closely the language of section 13 of the temperance act of 1859 than the language of other acts, it was treated as under the temperance law of 1859 rather than other acts; nor was it necessary that the information should allege that the defendant was keeping a licensed house under that act; nor that liquor sold by the defendant created the disturbance, it being sufficient if he suffered the liquor to be sold in his house.

APPEAL from the Hamilton Circuit Court.

DOWNEY, J.—Information against the defendant for keeping a disorderly house. It is charged in the affidavit and information, that the defendant, on the 15th day of Novem-

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ber, 1871, and on divers other days and times between that day and the day of the filing of this information, at, etc., unlawfully kept a certain house, in which intoxicating liquors were sold, bartered, given away, and suffered to be drank; and then and there permitted and encouraged divers persons to be and remain in and about said house by day and by night, drinking, carousing, swearing, hallooing, quarrelling, yelling, and uncovering and making exposure of their persons; and then and there and thereby kept said house in a disorderly manner, contrary to the statute, etc.

A motion by the defendant to quash the information was overruled, and the defendant excepted. Upon a plea of not guilty, there was a trial by jury, a finding against the defendant, fixing his punishment at two hundred dollars fine and thirty days imprisonment. On his motion, a new trial was granted to him, and he then pleaded guilty. The court, "having heard the evidence as to the degree of guilt," assessed the fine of the defendant at two hundred dollars, but did not inflict any imprisonment, and judgment was rendered accordingly.

The only question made is as to the sufficiency of the information.

Two objections are stated and urged to the information; 1. That it is not sufficiently specific, in this, that it does not show under what statute the case is prosecuted. 2. If it does sufficiently appear that the defendant is being prosecuted under the 13th section of the temperance act of 1859, then the information is bad, for the reason that it does not allege that the defendant was keeping a licensed establishment under that act, and that the disorderly conduct was caused by the defendant's sale of liquors, or was the result thereof.

It is claimed by counsel for the appellant, that there are three statutes, on any one of which the defendant could have been prosecuted; sections 8 and 10 of the act defining misdemeanors, 2 G. & H. pp. 460 and 461, and section 13 of the temperance law of 1859, 1 G. & H. 617. We think it

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sufficiently clear, if the fact need appear in the information, that it was upon the 13th section of the temperance law. The information pursues more closely the language of that act than that of either of the other sections. The fine which may be imposed under section 8 or 10 of the misdemeanor act cannot exceed one hundred dollars. But the court in this case imposed a fine of two hundred dollars, which is the maximum fine under section 13 of the temperance law.

We do not think there is anything in the second objection made. The 13th section says nothing about a license. But the question is already decided, as we think, by this court, in *Huber v. The State*, 25 Ind. 175. It was there held that an information substantially like that in the case under consideration, omitting to charge that the defendant was licensed, would be good under either section 10 of the misdemeanor act, or under section 13 of the temperance law of 1859. The law does not require that the State shall show whose sale of liquors caused the disorderly conduct. It might be difficult to do this, if several persons had sold liquors to the disorderly persons. Indeed, the statute does not require proof that the defendant sold any liquors. If he suffered it to be drunk in his house, it is enough, the other necessary facts concurring, to make him guilty under the statute and the information which charges both the selling, etc., and the suffering it to be drunk in his house.

The judgment is affirmed, with costs.

J. W. Evans and *R. R. Stephenson*, for appellant.

J. C. Denny, Attorney General, for the State.

ADAMS v. THE STATE.

CRIMINAL LAW.—Evidence.—Instruction.—Alibi.—In a criminal action, the charge to the jury, that under evidence of an *alibi*, “you should carefully examine, in order to ascertain whether, even if an absence be shown, that absence at another place was so complete and of such a character in regard to time and location, as to render the defendant’s presence impossible at the time and place of the commission of the alleged crime,” was held to be erroneous. If the jury believed the defendant to have been at another place at a given time, and if his being there then created a reasonable doubt of his presence at the place of the crime, at the time of its commission, he should have been acquitted.

APPEAL from the Tippecanoe Criminal Circuit Court.

WORDEN, J.—The appellant, Adams, was indicted in the court below for stealing a mare, saddle, bridle, and halter, the property of Albert S. Wright, and upon trial was convicted and sentenced to the penitentiary for the term of two years. He moved for a new trial, on the ground, amongst other things, that erroneous charges pointed out had been given to the jury, to which exception had been taken, but his motion was overruled. Exception.

The mare was stolen sometime during the night of the 26th of October, but at what particular hour did not appear. She was taken from the stable of the owner, two and a half or three miles north-west from the city of Lafayette. She was found on the next day at about two o’clock, at large, feeding along the highway, about three-fourths of a mile south of Reynolds, in White county. There were circumstances pointing to the defendant as the thief. But, on the other hand, there was evidence tending to show that the defendant was in Lafayette, at about five o’clock on the day mentioned; that he stayed in Lafayette that night and slept in the house of his mother-in-law. One witness testifies that he went to bed about three o’clock on the morning of the 27th, the defendant being then in the same bed; that he talked with him a few minutes, but does not know what time the defendant got up in the morning. No witness tes-

tifies as to what time the defendant got up in the morning and left the house.

The court gave, amongst others, the following charge:

“Evidence has been introduced, by the defendant, for the purpose of establishing an *alibi*, and is” [intended] “to show that the defendant, at the time of, and during the time required for, the commission of the crime charged, was at another place, and that, therefore, he could not possibly be guilty. Of course, if this be established, the defendant cannot be guilty; but a defence of this character is one which you should carefully examine, in order to ascertain whether, even if an absence be shown, that absence at another place was so complete and of such a character in regard to time and location, as to render the defendant’s presence impossible at the time and place of the commission of the alleged crime.”

This charge, as we think the jury must have understood it, when considered with reference to the evidence, implies that it must have been impossible for the defendant to have been at Lafayette at the times indicated by the evidence offered by him and also to have been present at the time and place of the larceny, in order that the defence should be available. We think the term “impossible” quite too strong a term to be employed in that connection.

If the jury believed that the defendant was at Lafayette at the times testified to by his witnesses, and if they also believed that it was improbable for him to have been there at those times and also to have been present at the time and place of the larceny, the defence was for the consideration of the jury. Such improbability need not, in such case, be so great as to amount to impossibility. If the jury believed that the defendant was at Lafayette at the times indicated by his testimony, and if the improbability of his being there at those times, and also of his being present at the time and place of the larceny, was so great as to raise a reasonable doubt in their minds of his guilt, taking all the evidence together, he was entitled to the benefit of that doubt, and

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therefore to an acquittal. We are of opinion that the charge was erroneous, and may have misled the jury. For this reason the judgment must be reversed.

The judgment below is reversed, and the cause remanded, for a new trial.

The clerk will give the proper notice for a return of the prisoner.

R. P. Davidson and *J. C. Davidson*, for appellant.

A. L. Kumler and *J. C. Denny*, Attorney General, for the State.

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PRACTICE.—*Special Finding.*—When what purports to be a special finding of the judge is not signed by him, and was not requested by either party, and is not included in a bill of exceptions, it can only be regarded as a general finding.

SLANDER.—*Conveyance to Defraud Creditors.*—Where slanderous words were spoken on the 1st day of August, and the persons liable to an action therefor, to avoid such liability for damages, fraudulently conveyed their real estate to their children without valuable consideration; on the 17th day of November, following, the grantees having notice of such fraudulent intent, and such action was commenced on the 26th day of the same month, and a recovery was subsequently had;

Held, that these facts were sufficient to subject the property to the judgment obtained. It was unimportant whether the deed was delivered before or after the commencement of the action.

SAME.—*Creditor.*—One having a cause of action for slander is a creditor within the intent of the statute against fraudulent conveyances.

APPEAL from the Marion Circuit Court.

DOWNEY, J.—The appellants sued the appellees, seeking to enjoin the sale of certain real estate, of which they claim to be the owners. It is stated, in substance, in the complaint, that on the 17th day of November, 1869, the real

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estate was conveyed, by Jeremiah Shean and Ellen Shean, to the appellants, by deed of that date, for the consideration of one dollar and natural love and affection, the grantees being children of the grantors, and that the deed was duly recorded on the 5th day of February, 1870. It is further stated, that said Jane Shay, on the 26th day of November, 1869, sued said Ellen Shean and Jeremiah Shean, for slanderous words spoken by said Ellen of her, in the said circuit court, and on the 2d day of November, 1870, recovered judgment against said Shean and wife for four hundred and fifty dollars and costs; that, on the 7th day of October, 1871, an execution was duly issued on said judgment to the sheriff, Ruckle, who is one of the appellees, who has levied the same on said property, and advertised the same for sale to pay and satisfy said judgment, etc. It is further alleged that the said Jeremiah Shean and Ellen Shean are not the owners of said real estate, but that the same is owned by the appellants. Prayer for an injunction, etc.

In the second paragraph of the answer, the defendants say that on the 1st day of August, 1869, the said slanderous words were spoken by the said Ellen Shean of the said Jane Shay, and that said Shean and wife, believing that said Jane Shay was about to institute an action therefor, and to prevent the collection by her of her damages therefor, fraudulently, and without any valuable consideration therefor, and with intent to cheat, delay, and defraud the said Jane Shay in the collection of said damages, executed the said deed to appellants, of all of which the appellants had full notice.

There was a demurrer by the appellants to this paragraph of the answer, for the reason that it did not state facts sufficient to constitute a defence to the action, which was overruled, and to which ruling the appellants excepted.

The appellants then replied in denial of the second paragraph of the answer. There was a trial by the court and what purports to be a special finding by the court with conclusions of law, but which we can treat only as a general finding, for the reasons that it does not appear to have been

made at the request of the parties or any of them, and it is not signed by the judge, or contained in any bill of exceptions. A motion for a new trial was made by the plaintiffs, which was overruled by the court, and final judgment rendered for the defendants.

Two errors are assigned: 1. The overruling of the demurrer to the second paragraph of the answer; and, 2. The refusal to grant a new trial.

We regard the facts alleged in the second paragraph of the answer, taken in connection with the allegations of the complaint, as sufficient to show that the conveyance in question was fraudulent. The slanderous words are alleged to have been spoken on the 1st day of August, 1869, and hence at that date a cause of action accrued to the appellee Jane Shay, against the said Shean and wife. The answer alleges that afterward, on the 17th day of November, 1869, as shown by the complaint, the deed was fraudulently made and received, to cheat and defraud the said Jane Shay out of the damages to which she was entitled. That no suit was pending to recover the damages when the deed was made, does not make the answer bad. As is said in *Ray v. Roe, ex dem. Brown*, 2 Blackf. 258, "the pendency of a suit is one of the many badges of fraud, which would induce a court of equity to set aside such conveyance, or a jury to regard it as a nullity, in a trial at law." But it is only one of the badges. The deed may be shown to be fraudulent and void as to creditors, when no suit was pending to recover the debt or damages when it was made. It may be true that in many cases the fraudulent deed is found to have been made after the commencement of the action. Such was the case in *Rogers v. Evans*, 3 Ind. 574, *Wright v. Brandis*, 1 Ind. 336, and *Pennington v. Clifton*, 10 Ind. 172. But the pendency of the action creates no lien, and a deed made for a valuable consideration and in good faith may be valid, notwithstanding the pendency, at the time, of an action against the grantor. *Lowry v. Howard*, 35 Ind. 170. The cases which we have already cited show that one having a cause

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of action for slander is a creditor within the meaning of the statute against fraudulent conveyances.

The other alleged error relates to the refusal to grant a new trial. In our judgment, the evidence fully sustains the finding of the court, and not only justified, but required the court to overrule the motion for a new trial. According to the view which we take of the case, the question whether the deed was delivered on the 17th day of November, 1869, before the suit was commenced, as claimed by counsel for the appellant, or on the 5th day of February, 1870, after the commencement of the action, as contended for by counsel for the appellee, need not be decided by us, as in either event we think the evidence was clearly sufficient to show the fraudulent character of the deed.

The judgment is affirmed, with costs.

I. Klingensmith, C. Coulon, and J. S. Harvey, for appellants.

F. M. Finch and J. A. Finch, for appellees.



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HADDON ET AL. v. HADDON.

PAROL AGREEMENT FOR CONVEYANCE OF REAL ESTATE.—*Part Performance.*—

Written Agreement.—Merger.—Statute of Frauds.—Where a son, having a claim against his father for labor and for an interest in certain crops, agreed to and did release the claim, move upon certain land belonging to his father, cultivate the same, and make visible, lasting, and valuable improvements, upon the verbal promise by his father to convey the land to him, and after nine years residence and labor on the land, built a dwelling-house thereon, upon the receipt of a letter from his father, stating that if he would erect a building on the land, he should either be paid the value of the building and interest thereon, or a deed to the land should be made, at the option of the father;

Held, that the letter did not merge the parol promise previously made, the performance of which, by the plaintiff, took it out of the statute of frauds; and that the contract could be enforced after the death of the father, in an action against the other heirs to have the title of said son in the land declared.

APPEAL from the Sullivan Circuit Court.

BUSKIRK, J.—The original complaint in this action consisted of three paragraphs. The first and third sought a specific performance of a contract for the sale of real estate. The second sought a partition of certain lands, between the widow and heirs at law of Jesse Haddon, deceased, and that a certain tract of land should be assigned to the appellee, at its cash value in 1861, when he claimed to have purchased it, and without estimating the improvements which he had placed upon it. A demurrer was sustained to the complaint for a misjoinder of causes of action; and the second paragraph was ordered to be docketed and tried separately.

A demurrer, for the want of sufficient facts, was overruled to the first and third paragraphs of the complaint, and this ruling is assigned for error and presents the first question for our decision.

It is averred in the first paragraph of the complaint, that on the 19th day of January, 1870, Jesse Haddon, Sr., died intestate, leaving the plaintiff, his son, and the defendants, his widow, and sons, and daughters, and descendants of sons and daughters, him surviving; and that such persons were his legal and only heirs; that on the — day of —, 1861, the said decedent was indebted to the appellee in the sum of about five hundred dollars, for work and labor performed for him in the years 1858, 1859, 1860, and 1861, and for corn sold and delivered in said years, and for his interest in two crops raised by appellee upon the lands of the decedent; that in consideration of said debt and the natural love and affection which the decedent had for his said son, he agreed with plaintiff, that if he would release or relinquish his said debt of five hundred dollars, and all claims in and growing out of said crops, and would remove upon and improve the lands particularly described in the complaint, and which were then owned and possessed by the decedent, he would convey the same to the plaintiff; that the plaintiff accepted of said offer, and in performance of his part of said contract, released his said debt and relinquished all interest

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in said crops, and immediately moved upon the said lands, and had, continuously therefrom, and down to the commencement of the action, continued to occupy, hold, and treat the same as his own; that during the time, he had so occupied the said premises, and under, and in pursuance of, said agreement, had greatly and permanently improved the same, by clearing, fencing, ditching, clovering, sinking wells, planting fruit-trees and shrubbery, and putting up buildings of the value of twenty-five hundred dollars; that the original agreement was in parol, and under such parol agreement all the improvements on said lands were made, except the building of the dwelling-house; that to induce the plaintiff to erect upon the said premises a new dwelling-house, the decedent executed and delivered to him a written instrument, a copy of which was filed with, and made a part of, the complaint; that under and in pursuance of said written instrument, he proceeded to and did erect and construct said house; that the said Jesse Haddon, Sr., had departed this life without having executed to the plaintiff a deed for said premises. The prayer was for a specific performance of said contract.

The third paragraph was in substance the same as the first. The written instrument referred to in, and made a part of, the first and third paragraphs of the complaint, was in these words:

“NEW LEBANON, September 12th, 1869.

“I suppose you are fearful that you may lose your labor of building a house on the place you are living on; I will just say to you, go on and build, and when done have it valued by workmen, and you shall have the full amount of the valuation and ten per cent. till paid or a deed to the land, deeded to you or your heirs at my option. Keep this as a guarantee or evidence in the case.

[Signed.]

“JESSE HADDON.”

The position assumed by counsel for appellants is, that the parol agreement made in 1861, and in pursuance of which all the improvements were made, except the erection of the

house, was merged in the written agreement; and that it is not averred in the complaint that the house was erected and completed in pursuance of the written agreement.

The written agreement referred solely and exclusively to the building of the house, and had no reference to the acts which had been done under the parol contract. It is the settled rule, that all previous negotiations and parol contracts are presumed to be merged in a written contract relating to the same matter, but we know of no authority holding that the same rule would apply to acts of part performance done under a parol agreement, where the written agreement relates to other and different acts than those done under the parol agreement. In our opinion, the right of the appellee to a decree for specific performance does not depend upon the letter written by the decedent in reference to the building of the house. It was agreed, between the decedent and the appellee, in 1861, that if the appellee would release his debt against the decedent, and would move upon the premises in controversy, and make lasting and valuable improvements thereon, the decedent would convey such premises to the appellee. Under and in pursuance of such agreement, the appellee moved upon the premises, released his debt, remained in the open and undisturbed possession of the premises for nine years, and made lasting and permanent improvements, that were palpable and evident to the senses of all. The absolute and visible possession of the premises, the clearing of ten acres of land, the building of new, and the repair of old fences, the planting of several hundred fruit-trees, the sinking of wells, and the clovering of a considerable part of the farm, constituted such acts of part performance as clearly took the case out of the operation of the statute of frauds; and, in our opinion, the building of a house at the cost of twenty-five hundred dollars, under the written promise of the decedent, to either pay the cost of such building, with ten per cent. interest, or to convey the land, cannot be regarded as a waiver and abandonment of the parol contract, and the acts which had been performed

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thereunder. The case of *Lobdell v. Lobdell*, 36 N. Y. 327, is much in point. In that case it was held, that a parol agreement between father and son that on condition the son would enter upon land (a certain tract) and improve it, the father would make him a deed for the same, in pursuance of which agreement the son did enter upon the land, occupy, and improve it, was sustained by a sufficient consideration, and was not within the statute of frauds. *Pearson v. East*, 36 Ind. 27.

It is very clear to us that both the first and third paragraphs of the complaint were good, and that the court committed no error in overruling the demurrer thereto.

There are other assignments of error, based upon the action of the court in receiving and excluding evidence, and in giving and refusing to give instructions, but none of these questions arise upon the record in this cause. There is no bill of exceptions in the record. The court gave the appellant thirty days time, which was beyond the term, in which to file a bill of exceptions. The clerk has copied into the transcript what he calls a bill of exceptions, but it is not signed by any judge or person assuming to act as such. It is not signed at all. The validity of a bill of exceptions depends upon the approval and signature of the judge. Sec. 346, 2 G. & H. 209.

Besides, there is nothing to show that the bill was filed within the time limited by the court. These objections are pointed out in the brief of appellee. No attempt has been made to amend the record. We are bound to assume that counsel for appellants have examined the brief of appellee, and know that the record speaks the truth. Any other presumption would do great injustice to the very able and careful attorneys for appellant. *Kesler v. Myers*, 41 Ind. 543.

The judgment is affirmed, with costs.

S. Coulson, S. R. Hamill, and J. C. Denny, for appellants.

G. H. Voss, B. F. Davis, and J. A. Holman, for appellee.

LEHRITTER v. THE STATE.

LIQUOR LAW.—Indictment.—Sunday.—Permit.—In an indictment for the sale of intoxicating liquor on Sunday, to be drank on the premises, it is not necessary that there should be an express allegation that the defendant had no permit to sell liquor, as such permit would not authorize a sale on that day.

SAME.—Section 10.—The tenth section of the act of 1873, regarding the sale of liquors, forbids the sale on Sunday.

SAME.—Evidence.—When, on the trial of such an indictment, the proof showed that the selling was on the fourth day of May, and on Sunday, but there was no proof as to the year;

Held, that the conviction could not be sustained, although May 4th, 1873, was Sunday.

APPEAL from the Marion Criminal Court.

DOWNEY, J.—This was an indictment against the appellant charging that he did, on the 4th day of May, 1873, at, etc., unlawfully sell two gills of intoxicating liquor to Henry Case, at and for the price of ten cents, and did then and there suffer and permit the said liquor to be drank in the building and upon the premises where the same was sold, the said 4th day of May being the first day of the week, commonly called Sunday, contrary to the form of the statute, etc.

The defendant moved the court to quash the indictment, his motion was overruled, and he excepted. He then pleaded not guilty, and upon a trial of the cause by the court, by agreement of the parties, he was found guilty and a fine assessed against him. He moved for a new trial and also in arrest of judgment, which motions were each overruled, and he again excepted. There was final judgment rendered against the defendant for the fine assessed and the costs, and that he stand committed until they were paid or replevied.

These several rulings of the court are assigned for error.

We see no objection to the indictment. It is true that it does not allege directly that the defendant had no permit to sell liquors; but it does, in effect, allege that he had no permit to sell the liquor in question, by stating that the sale

was on the first day of the week, commonly called Sunday. A permit, if he had had one, could not have authorized him to make the sale on that day. The tenth section of the act on the subject of selling liquors, Acts 1873, p. 154, reads as follows: "A permit granted under this act shall not authorize the person so receiving it to sell intoxicating liquors on Sunday, nor upon the day of any state, county, township, or municipal election, in the township, town or city where the same may be held; nor upon Christmas day, nor upon the Fourth of July, nor upon any Thanksgiving day, nor upon any public holiday, nor between nine o'clock P. M. and six o'clock A. M.; and any and all sales made on any such day, or after nine o'clock on any evening, are hereby declared to be unlawful, and upon conviction thereof, the person so selling shall be fined not less than five dollars nor more than twenty-five dollars for each sale made in violation of this section." The allegations of the indictment very clearly bring the case within this section of the act.

There was, therefore, no error in overruling the motion to quash the indictment, and that in arrest of judgment.

Upon an examination of the record, we find that, among other reasons for a new trial, it was assigned that the evidence was not sufficient to justify the finding of the court. The evidence shows that the liquor was sold on the 4th day of May, and on Sunday, but it wholly fails to show in what year it was sold. We know that the 4th of May, in this year, was Sunday, but this does not show that the year 1873 was intended. It may have been on some Sunday in some other year, which was the 4th of May to which the witness referred. For this defect in the evidence, the judgment must be reversed.

The judgment is reversed, and the cause remanded, with instructions to grant a new trial.

W. F. Brown and *W. P. Adkinson*, for appellant.

J. C. Denny, Attorney General, for the State.

CARR v. EATON.

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CONTINUANCE.—*Motion for New Trial.*—*Assignment of Error.*—The refusal to grant a continuance can only be presented as error by making it a cause for a new trial and assigning the overruling of that motion as error on appeal.

APPEAL from the Howard Circuit Court.

DOWNEY, J.—The judgment below in this case was in favor of the appellee against the appellant. The errors assigned are: 1. The overruling the defendant's motion for a continuance of the cause. 2. The refusal of the court to grant a new trial, and, 3. The overruling of the defendant's motion for judgment on the special findings by the jury.

The first error assigned cannot be sustained. Where the court has improperly refused to grant a continuance, the ruling must be made the ground of a motion for a new trial, in order to present the question to this court, and then it must be done by assigning as error the overruling of the motion for a new trial. *Kent v. Lawson*, 12 Ind. 675; *Scoville v. Chapman*, 17 Ind. 470; *The Bellefontaine Railway Co. v. Reed*, 33 Ind. 476. This was not done in this case.

One ground on which it is claimed that a new trial should have been granted is, that the evidence is not sufficient to sustain the finding of the jury. The amount of the verdict was one hundred and nine dollars and ninety-two cents. Counsel for appellant contend that, at most, it should have been only eighty-four dollars and seventy-two cents. The evidence covering the items making up the difference, which is twenty-five dollars and twenty cents, is too conflicting to justify us in disturbing the judgment on this ground. The remaining ground is, that the court erred in giving the second and third instructions to the jury. We think there was no error in giving the instructions. The jury were told, in substance, that they should allow the accounts on each side, so far as proved, and make their verdict accordingly.

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The remaining question, as to the action of the court in refusing to render judgment for the defendant on the special findings of the jury, must also be decided against the appellant. We need not set out the interrogatories to the jury and their answers thereto. It is enough to say that there is not that inconsistency of the special findings with the general verdict which would authorize us to say that judgment should have been rendered on them rather than on the general verdict. *Campbell v. Dutch*, 36 Ind. 504, and cases cited.

The judgment is affirmed, with five per cent. damages and costs.

N. P. Richmond and *C. E. Hendry*, for appellant.

M. Bell and *A. S. Bell*, for appellee.

HUSTON v. ROOSA.

APPEAL from the Wayne Common Pleas.

DOWNEY, J.—This was an action by the appellee against the appellant and one Fitzgerald, to compel the surrender and cancellation of a promissory note, and there was final judgment for the plaintiff. Huston alone appeals and has assigned errors, without complying with section 551, 2 G. & H. 270. The appeal is for this cause dismissed, at the costs of the appellant.

W. A. Peelle and *H. C. Fox*, for appellant.

W. A. Bickle and *J. B. Julian*, for appellee.

Reynolds v. Ross.

REYNOLDS v. ROSS.

SLANDER.—In a complaint for slander, the words spoken were alleged thus:

“You are a G—d d——d, lying, thieving son of a bitch.”

Held, on demurrer, that the words were actionable.

APPEAL from the Delaware Circuit Court.

DOWNEY, J.—Action for slander by the appellee against the appellant. A demurrer to the complaint was overruled, and the appellant excepted. Issues were formed, and there was a trial by jury, and a verdict for the plaintiff. A motion by the defendant for a new trial overruled, and final judgment for the plaintiff.

But one question is presented by the assignment of error, and that is as to the sufficiency of the complaint. The objection is that the words as charged are not actionable. The words alleged to have been spoken to and of the plaintiff are these: “You are a G—d d——d, lying, thieving son of a bitch.” In *Alley v. Neely*, 5 Blackf. 200, this court said: “The adjective thieving imports an act committed, and not merely an inclination to commit it. To charge one with being a thieving person is charging him with being guilty of stealing. *Bittridge's Case*, 4 Coke's Rep. 19; *Osborn v. Poole*, 1 Lord Raym. 236; Stark. on Slander, 64.” The use of the letters “G—d d——d” does not render the complaint bad in this case. If they are wholly omitted or disregarded, the slanderous charge is still the same.

The judgment, which was for one hundred and forty dollars, is affirmed, with ten per cent. damages and costs.

J. S. Buckles and J. W. Ryan, for appellant.

T. J. Sample, for appellee.

McDonald v. Yeager.

MCDONALD v. YEAGER.

PROMISSORY NOTE.—Pleading.—Variance.—Where suit was brought as upon a promissory note, and a due-bill was filed as an exhibit, it was held on demurrer, that the variance, being amendable under the statute, would be disregarded.

MOTION TO MAKE NEW PARTIES.—Street Improvement.—A motion by the defendant in such action, to make the mayor and common council of a city parties plaintiffs, also, on the ground that the due-bill in suit was executed for a street improvement in said city, and given to the contractor therefor, and that three years after the same was due and unpaid, the city had issued a precept to collect the same, was properly overruled.

APPEAL from the Fountain Common Pleas.

DOWNEY, J.—The appellee sued the appellant, alleging in his complaint that the defendant on the 17th day of April, 1868, by his note, a copy of which is filed, etc., promised to pay, etc. The instrument, a copy of which is filed with the complaint, reads as follows:

“\$244.60 “ATTICA, Indiana, April 17th, 1868.

“Due John B. Yeager the sum of two hundred and forty-four dollars and sixty cents, with interest from date.

“J. D. McDONALD.”

The defendant moved that the mayor and common council of the city of Attica be made additional plaintiffs in the action, and filed a petition therefor, stating that the claim of the plaintiff, Yeager, was based upon a certain street improvement called “lateral guttering,” ordered to be made in the city of Attica in the year 1867, by the said common council, along the premises of said McDonald; that said Yeager pretends to have done said work and so represented to the defendant at the time the defendant gave him the said due-bill; that, relying upon said representations of said Yeager, the defendant gave him said due-bill, believing at the time from such representations, that his liability, if any, was to Yeager, and not to the city of Attica; he said Yeager being then and there the person to whom said work was let by the city. But defendant states the fact to be, that although said Yeager was then and there the contractor to perform

said street improvement, yet, for some reason unknown to him, the city of Attica did not, in fact, release her demand upon him, and by proper precept has proceeded to order the said defendant's premises to be sold, to pay for said improvement; and so it is that unless the city of Attica be made a party, the defendant may be compelled to pay for said improvement, both to said Yeager and to the said city of Attica. The court overruled this motion, and the defendant excepted and reserved the question by proper bill of exceptions.

The defendant then demurred to the complaint, for the reason that it did not state facts sufficient to constitute a cause of action. This demurrer was also overruled, and the defendant again excepted. The defendant failing and refusing to plead over, final judgment was rendered for the plaintiff.

The errors assigned are the overruling of the demurrer to the complaint, and also the overruling of the motion to make the mayor and common council of the city of Attica parties to the action.

The ground of objection made to the complaint, by counsel for the appellant in their brief, is, that the instrument which is the foundation of the action, and which, in the complaint, is styled a "note," is not a note, but is a due-bill only. They contend that as the complaint says it is predicated upon a note, the copy of a note, and not of a due-bill, must be filed with it. Perhaps the instrument in question does not answer to the common definition of a promissory note, which is found in the books, because it does not contain a promise to pay a certain sum of money at a future time. But when the instrument or a copy of it is filed with the complaint, in pursuance of the requirements of the code, it is expressly provided that any variance between the pleading and copy of the instrument filed, as to matter of description, or legal effect, may be amended at any time, as of course, before judgment, without causing a continuance. 2 G. & H. 104, sec. 78. And this court cannot reverse a judg-

The Ohio and Mississippi R. W. Co. *v.* Cobb.

ment for any variance which might have been amended in the court below. 2 G. & H. 278, sec. 580.

We think the court committed no error in overruling the motion to make the mayor and common council plaintiffs with Yeager. No sufficient reason is shown for making them plaintiffs in the action. The due-bill was given on the seventeenth day of April, 1868, and was then due. This action was not commenced until May 4th, 1871. Perhaps this delay may explain the reason for the issuing of a precept to collect the amount due for the improvement, which the appellant seems not to understand. By the law, the money is due to the contractor, although collected by virtue of a precept issued by authority of the city. If the appellant shall be pressed for payment of the money a second time, after having paid it once, it will then be time enough for the courts to interfere in his behalf.

The judgment is affirmed, with ten per cent. damages and costs.

L. T. Miller and J. M. Hall, for appellant.

THE OHIO AND MISSISSIPPI RAILWAY CO. *v.* COBB.

PRACTICE.—*Bill of Exceptions.—Time of Filing.*—Where it is not shown that a paper purporting to be a bill of exceptions was filed within the time limited, it cannot be considered.

APPEAL from the Jackson Circuit Court.

BUSKIRK, J.—This was an action, under the statute, by the appellee against the appellant, to recover the value of a mare alleged to have been killed by the locomotive and cars of the appellant.

There was issue, trial by the court, finding for appellee. The appellant's motion for a new trial was overruled, and

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sixty days were given in which to file a bill of exceptions embodying the evidence. There is a bill of exceptions in the record, but it is not shown that it was filed within the time limited, and for that reason we can not regard the evidence as in the record. The only assignment of error is based upon the action of the court in overruling the motion for a new trial. Inasmuch as the evidence is not properly before us, we can not pass upon its sufficiency to support the verdict.

The judgment is affirmed, with ten per cent. damages and costs.

T. Gazlay, for appellant.

W. K. Marshall, for appellee.

PLEASANTS v. THE VEVAY AND MOOREFIELD TURNPIKE COMPANY.

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APPEAL.—*Restraining Order*.—No appeal lies from an order made by a judge in vacation dissolving a restraining order.

APPEAL from an interlocutory order of the judge of the Switzerland Circuit Court, made in vacation, dissolving a restraining order.

BUSKIRK, J.—The appellee has moved to dismiss the appeal in this cause, upon two grounds :

1. That the restraining order was only temporary, from which no appeal would lie, and that consequently an appeal would not lie from an order made even in term dissolving such order.

2. That the appeal in this case was taken from an order made in vacation dissolving such temporary restraining order.

Appeals to the Supreme Court only lie from final judg-

proper time, to each of these rulings. Each of these motions should have been sustained.

Sec. 16, 2 G. & H. 394: "Each juror must take the usual oath. The court must plainly instruct them as to their duty. An indictment may be found by any nine. It must be indorsed by the foreman, 'A true bill.—A. B. foreman,' returned into open court, and filed by the clerk."

Sec. 17, on same page: "Each indictment must be signed by the prosecuting attorney, and when the grand jury return any indictment into court, the judge must examine it; and if the foreman has neglected to endorse it, 'A true bill,' with his name signed thereto, or if the prosecuting attorney has neglected to sign his name, the court must cause the foreman to indorse, or the prosecuting attorney to sign it, as the case may require, in the presence of the jury."

These are positive requirements that the indictment shall be returned into open court by the grand jury, endorsed by the foreman, and that it shall be signed by the prosecuting attorney, and that the court must cause these signatures to be placed on and to the indictment, if they or either of them are wanting at the time it is returned.

The indictment was not signed by the prosecuting attorney or any person else; nor does the record show, in any place or manner, that it was returned by the grand jury. Without these requisites the indictment had no more force than a blank piece of paper. It could not subject the party to trial and punishment under it, but ought to have been quashed on motion. *Adams v. The State*, 11 Ind. 304; *Jackson v. The State*, 21 Ind. 79; *Jackson v. The State*, 21 Ind. 171; *Hall v. The State*, 21 Ind. 268; *Sawyer v. The State*, 17 Ind. 435; *Conner v. The State*, 18 Ind. 428; *Bailey v. The State*, 39 Ind. 438.

We do not think that this opinion conflicts with any ruling of this court, unless it is that of *M'Gregg v. The State*, 4 Blackf. 101; and the ruling of the court in that case seems to be a mere statement of the court, that the indictment need not have appended to it the name of the prosecuting attor-

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ney, without any authority cited. The statute at that time may not have been like our present one, which positively requires that the indictment shall be signed by the prosecuting attorney.

As the motion to quash ought to have been sustained, there are no other questions properly in the record.

The judgment is reversed, with instructions to the court below to sustain the motion to quash the indictment.*

L. W. Gooding, H. Craven, and C. L. Henry, for appellant.

J. C. Denny, Attorney General, for the State.

* Petition for a rehearing overruled.

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PLEADING.—*Abatement.*—*Another Action Pending.*—An answer in abatement, alleging the pendency of another action, must show that it is between the same parties.

VENUE.—*Change of.*—*Issues.*—When a motion is made to change the venue of a cause from the county, on account of local prejudice, the court may suspend action on the motion until the issues are closed; for it may happen that there will be nothing for a jury to try.

NEW TRIAL.—*Motion.*—Error in sustaining a demurrer, and error in permitting a plaintiff to amend his complaint, are not causes for a new trial.

APPEAL from the Wells Circuit Court.

OSBORN, C. J.—This was an action to foreclose a mortgage, and for a personal judgment against one of the mortgagors. The complaint alleges that George W. Dawson executed four promissory notes of seven hundred and fifty dollars each payable to the order of Bayliss, Vaughan, & Co.; that he and his wife executed a mortgage upon certain real estate, machinery, etc., for a saw-mill, in Wells county; that the notes had all been endorsed in writing to the appellee; that a part of them were due and unpaid. Prayer for judgment

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of foreclosure, and personal judgment against the maker of the note, and other proper relief. Copies of the notes and endorsements and the mortgage are filed with and made a part of the complaint.

The defendants appeared and filed the affidavit of the appellant George W. Dawson, that he believed he could not have a fair and impartial trial in Wells county, because of an odium attaching to him on account of local prejudice, and moved the court for a change of venue. The motion was sustained, and an order entered that the venue should be changed upon the completion of the issues. Afterward, the appellants filed an answer in abatement, alleging "that before the bringing of the action, to wit, on the — day of —, 1871, in the circuit court of Wayne county, in this State, a suit was then and there pending between Joseph M. Bayliss and Andrew F. Vaughan, under the firm name of Bayliss, Vaughan, & Co., against George W. Dawson *et ux.*; that this suit was pending for the same cause of action as in the present suit mentioned; that said action in said court was pending at the bringing of this suit." Prayer that the suit abate. To that answer a demurrer was filed and sustained, and the appellants excepted. They declined to answer further, and elected to abide by the demurrer. On motion of the appellee, the assessment of damages was submitted to the court, and, after a proper finding, final judgment was rendered for the appellee and for a foreclosure, etc.

After the rendition of the judgment, a motion for a new trial was filed, first, because the court erred in sustaining a demurrer to the answer in abatement; second, the court erred in permitting the plaintiff to amend his complaint after answer filed. The motion was overruled, and they excepted.

The errors assigned are, first, in sustaining the demurrer to the answer; second, in continuing to take and retain jurisdiction after the motion for change of venue had been made and granted; third, in sustaining the motion of the appellee to submit the cause for trial to the court, and in hearing and finding the facts after the motion for a change of venue had

been made and sustained ; fourth, in overruling the motion for a new trial.

The answer was fatally defective. An answer in abatement of the pendency of another action must show that it is between the same parties. *Loyd v. Reynolds*, 29 Ind. 299 ; *Smith v. Blatchford*, 2 Ind. 184. In *Atkinson v. The State Bank*, 5 Blackf. 84, it was held that a plea of the pendency of another action against the defendant and another was good, though there might have been a misjoinder. The action was by the same plaintiff, and Atkinson was a defendant in both actions. The appellee in this case was not a party to the action in Wayne county; had no control over and would not be bound by any judgment rendered in it. The endorsements of the notes are without date. The presumption is, that they were made at the date of the notes. *Ewing v. Sills*, 1 Ind. 125 ; *Bates v. Pricket*, 5 Ind. 22. The answer was not verified. Answers in abatement should be sworn to. The proper practice would have been to move to reject or strike it from the files, but as the proper result was reached, the case should not be reversed because of the error in its mode. *The Indianapolis, Peru, and Chicago Railway Company v. Summers*, 28 Ind. 521.

The second and third assignments of error will be considered together.

The court was not required to make the order changing the venue until an issue of fact was formed. When a motion is made to change the venue of a cause from the county on account of local prejudice, before an issue of facts is made, the court may suspend action on the motion until the issues are closed. It may happen, as in the case at bar, that there will be nothing for a jury to try. 2 G. & H. 218, sec. 367.

The grounds or reasons for a new trial, stated in the motion, are not causes for a new trial under the statute.

The judgment of the said Wells Circuit Court is affirmed, with costs and three per cent. damages on seventeen hun-

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dred and thirty-four dollars and ninety-six cents, the amount found to be due.

L. M. Ninde, for appellants.

J. S. Dailey and *L. Mock*, for appellee.

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ALEXANDER v. MULLEN ET AL.

PLEADING.—*Injunction*.—*Levy of Execution*.—Complaint by A., alleging that B. recovered a judgment against A. and a turnpike company; that execution was issued on the judgment; that the sheriff had levied the execution on the house and lot of A., being his homestead and dwelling-house; and that at the time of the levy and before, A. and the turnpike company offered to give up a toll-house to be levied upon and sold to satisfy the execution. Prayer, that the sheriff be enjoined from selling the house and lot of A.

Held, that the complaint was bad, for not averring that the toll-house belonged to the execution defendants, or one of them.

APPEAL from the Henry Circuit Court.

DOWNEY, J.—The only question in this case is as to the sufficiency of the complaint, which was adjudged bad on demurrer in the circuit court. The appellant, in the complaint, alleges that at the May term of the said circuit court, in the year 1871, Eliza Slatter recovered a judgment against the North-Western Turnpike Company and the appellant for a certain amount of money; that an execution of *fiery facias* was issued upon the judgment and placed in the hands of said Mullen as sheriff of said county; and that the sheriff had levied the same upon the house and lot of the appellant, being his homestead and dwelling-house, a description of which is given in the complaint. It is then alleged, "that at and before the time said execution was levied, the plaintiff, Harvey Alexander, and the North-Western Turnpike Company, by their directors, offered to give up to said sheriff one toll-house situated in said county, of the value of five hundred dollars, and they still offer to

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give up, to be sold upon said execution, said toll-house. Wherefore the plaintiff prays that the said sheriff be enjoined from selling said dwelling-house, until he has exhausted the other property of the defendants, and until he has first levied upon and sold said toll-house."

It is very clear that the circuit court committed no error in sustaining the demurrer to the complaint. An objection to the complaint which lies at the surface is, that it does not appear that the toll-house, which was turned out to be levied upon by the sheriff, was owned by the execution defendants or either of them. We think there may be other objections to the complaint, but we need not decide whether there are or not.

The judgment is affirmed, with costs.

J. Brown and *R. L. Polk*, for appellant.

M. E. Forkner and *E. H. Bundy*, for appellees.

KEISER ET AL. v. YANDES.

APPEAL.—Practice.—Dismissal.—Where only a part of the judgment defendants in an action appeal, and notice of the appeal is not served on the others, the appeal will be dismissed.

APPEAL from the Marion Common Pleas.

DOWNEY, J.—The judgment, from which the appeal in this case is taken, was rendered in favor of the appellee against George Keiser, George Nichol, Amos J. King, Edward T. Sinker, Daniel Yandes, Sr., and George B. Yandes. The appeal is taken and the errors assigned by Keiser, Nichol, and King only, and there is no notice served on the other judgment defendants, as required by sec. 551, p. 270, 2 G. & H. The appeal must, for this reason, be dismissed.

Appeal dismissed, with costs.

M. S. Robinson and *J. W. Lovett*, for appellants.

Pavy et al. v. The Greensburgh and Columbus Turnpike Co. et al.

PAVY ET AL. *v.* THE GREENSBURGH AND COLUMBUS TURNPIKE
CO. ET AL.

TURNPIKE.—*Assessments.—Injunction.—Estoppel.*—The facts that persons whose lands have been assessed, to aid in the construction of a turnpike, are stockholders in the turnpike company, and have paid a part of their assessments, and have stood by and seen the work of constructing the road proceed, will not estop them from resisting the payment of an illegal assessment.

SAME.—Nor will such persons be estopped, though one of them appeared before the board of equalization and presented his grievance, and the others failed to appear, though notified, and they have stood by and seen a part of the road built, the remainder of which cannot be constructed without the collection of the assessments.

SAME.—*Board of Equalization.*—The board of equalization has no power to assess lands to aid in the construction of a turnpike, where the assessors have omitted such lands.

APPEAL from the Decatur Common Pleas.

OSBORN, C. J.—This was an action by the appellants to enjoin the collection of an assessment for benefits under the acts for the construction of turnpike roads, etc. The complaint contains an allegation, that all the lands within one mile and a half of the road were not examined, viewed, or assessed by the assessors; that there was omitted from their list one thousand acres lying within that distance from the road.

The answer as filed was in five paragraphs, but the first, second, and third paragraphs were withdrawn, leaving only the fourth and fifth. The fourth is pleaded as an estoppel, alleging that the appellants were stockholders; that they had paid a part of the assessments; and that they had stood by and seen the work of constructing the road proceed without objections, etc.

We do not deem it necessary to discuss the questions in the answer, as they have been fully considered in the cases of *Hopkins v. The Greensburgh, Kingston, and Clarksburg Turnpike Company*, 40 Ind. 44, and *The Greensburgh, Milford, and Hope Turnpike Company v. Sidener*, 40 Ind. 424.

In the fifth paragraph of the answer, it is alleged that one

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of the appellants applied to the board of equalization and presented his grievance before the board; that all of the others failed and refused to do so after notice of the time and place of their meeting; that the company afterward, believing that all the lands liable had been listed and assessed, proceeded to build one end of the road; that the remainder of it could not be built unless the assessments could be collected; and that the appellants had stood by and allowed them to build the road without objection, and says that the appellants are estopped from setting up the matter in the complaint. Demurrers were overruled to both paragraphs. Proper exceptions were taken and errors assigned.

What we have said about the fourth is applicable to the fifth paragraph. The allegations about the board of equalization cannot affect the case. That board had no power to assess any lands omitted by the assessors. They could only equalize those assessed.

The complaint was good, and the demurrer to it was correctly overruled.

The judgment of the Decatur Common Pleas Court is reversed, with costs. Cause remanded, with instructions to the court below to sustain the demurrers to the fourth and fifth paragraphs of the answer, and for further proceedings, etc.

J. S. Scobey and *O. B. Scobey*, for appellants.

C. Ewing, *J. K. Ewing*, *J. Gavin*, and *J. D. Miller*, for appellees.

Sankey v. The Terre Haute and South-Western R. R. Co. et al.

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SANKEY *v.* THE TERRE HAUTE AND SOUTH-WESTERN RAILROAD CO. ET AL.

RAILROAD.—*Tax Assessed to Pay for Stock in Incorporated Company.*—*Mandate.*—Neither a railroad company nor one to whom it has contracted to assign a subscription or donation, made by a county or township, under the act of 1869, can maintain an action for a mandate against the treasurer of the county, to compel him to collect a tax placed on his duplicate and assessed for the purpose of aiding in the construction of the railroad. All the acts of the voters and county commissioners in taking steps to raise money, with which to subscribe and pay for stock in an incorporated company, or make a donation to it, are between themselves, one the principal, and the other the agent; there is no contract in such case with the railroad company, nor has it any right or control over the matter, until the money is raised and the stock taken and paid for, or the donation actually made.

SAME.—*Act of 1873.*—*Vested Rights.*—The act of January 30th, 1873, supplemental to the act of 1869, authorizing aid to railroad companies, is not unconstitutional on the ground that it divests rights vested in railroad companies; there being no rights to be divested.

APPEAL from the Vigo Circuit Court.

OSBORN, C. J.—The appellees filed their complaint against the appellant in the Vigo Circuit Court, in which it is alleged that the necessary acts had been done and steps taken to authorize the levy and collection of a tax in certain townships in Vigo county, to aid in the construction of the railroad of the company; that the tax had been legally and properly placed upon the tax duplicate of the county; that the appellant was the county treasurer, and as such had the duplicate in his hands for collection; that he had failed and refused to receive or collect the tax so levied and placed upon the duplicate. It is further alleged that Jackson had taken a contract to construct a part of the road of the company, and the company had agreed to assign over to him the subscriptions in the townships of Vigo county; that on the faith of the appropriations, he and the company had incurred large expenses in the construction of the road. A mandate was asked against the appellant, compelling him to receive and collect the tax as other taxes are collected.

The appellant waived the issuing and service of any alter-

nate mandate, and filed an answer and return as though an alternate mandate had been issued, to which the appellees filed a demurrer. The demurrer was sustained and the appellant excepted, and refusing to amend or answer further, judgment was rendered against him and for a peremptory mandate as prayed for.

The errors assigned bring before us the question of the right of the appellees to prosecute the action for the mandate.

This is not the first time this question has been before the court. In the case of *The Board of Commissioners of Crawford County v. The Louisville, New Albany, and St. Louis Air Line Railway Company*, 39 Ind. 192, it was held that the railway company could not maintain a mandate against the commissioners to compel them to cause the tax to be collected after it had been voted; that all the acts of the county commissioners and the voters of the county in taking steps to raise the money, with which to subscribe and pay for the stock of the railroad company, were between themselves, one the principal and the other the agent, and that there was no contract with the company, nor had it any right in, or control over, the matter until the money was raised and the stock taken. We adhere to the ruling in that case. The constitutionality of the act authorizing the tax is maintained upon the theory that the county is not bound until the money is in the treasury; that no right vests in the company until the stock is subscribed and paid for, or the donation is actually made. The county is prohibited from subscribing for stock in any incorporated company, unless the same is paid for at the time. It is also prohibited from lending its credit to any incorporated company, and from borrowing money for the purpose of taking stock in any such company. The leading case in this State affirming the constitutionality of the act of 1869, authorizing the tax and subscription, recognizes the above doctrines. *The Lafayette, Muncie, and Bloomington Railroad Company v. Geiger*, 34 Ind. 185. On page 219, it is said to be plain from the law, that it was not intended to bind the county for a dollar until the money

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should be in the treasury, from the special tax levied to pay for the stock, and that no subscription was authorized by the law until that time.

The company had no legal right to the subscription contemplated by the voters, and the contract to assign it to Jackson conferred none upon him. It follows that the act of January 30th, 1873, mentioned in the answer of the appellant, is not unconstitutional on the ground of divesting vested rights of the appellees.

The complaint did not state facts sufficient to constitute a cause of action, and the demurrer to the answer should have been sustained to the complaint.

The counsel for the appellant, in his brief, considers it due to the court below to state that the case first mentioned was not cited, nor was this question presented then, although it is in the record.

The judgment of the said Vigo Circuit Court is reversed, with costs. Cause remanded, with instructions to sustain the demurrer to the answer to the complaint, and for further proceedings in accordance with this opinion.

ON PETITION FOR A REHEARING.

OSBORN, C. J.—A very respectful and able petition for a rehearing is filed in this cause, in which we are earnestly desired to consider and construe the act of January 30th, 1873, Acts 1873, p. 184. It is stated that in one of the townships voting the aid, the sum of one hundred and fifty thousand dollars has been voted, whilst the company cannot expend in that township, in the actual construction of the road, more than twenty-five thousand dollars, and that the company is greatly embarrassed by the act of the General Assembly. If we were to do as requested, we fear that we might add to, instead of relieving the company from its embarrassment. The opinion would be an *obiter* one, binding upon no one. It could not be considered as the expression of the opinion of the court. We consider it better that

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the writer of an opinion should confine himself to the questions involved in the record, and not travel outside of it to give instructions. We hold in this case that neither the railroad company nor its contractor can maintain an action for a mandate, and the validity or construction of the law cannot arise in such an action brought by them.

The petition is overruled.

J. M. Allen, W. Mack, D. W. Voorhees, and J. C. Briggs, for appellant.

J. P. Baird, C. Cruft, and J. G. Williams, for appellees.

HARPER v. THE STATE.

CRIMINAL COURT.—Grand Jury.—Sessions of.—The law does not provide for a grand jury for a criminal court for each month during which, or any part of which, the court may be in session; but it does provide for a grand jury for each term; and if the court, at the same term, can legally be in session in two or more months, the same grand jury may sit in each month.

SAME.—Of Floyd County.—The criminal court in Floyd county can, under the act organizing that court (3 Ind. Stat. 178, sec. 1) and the act of Feb. 12th, 1855 (2 G. & H. 11), adjourn from a regular term of said court to some other certain time, and if such time is in a month within which the grand jury has not already been in session ten days, the grand jury may legally meet in connection with the court, and find and return indictments.

APPEAL from the Floyd Criminal Court.

DOWNEY, J.—This was a prosecution, in the name and by the authority of the State, against the appellant, for the crime of larceny. The record shows that the grand jury which found the indictment was empanelled on the first day of the January term, 1873, of the criminal court, which was the sixth day of January, 1873. The indictment was returned on the eighth day of March, 1873. The record shows an adjournment of the court from the twentieth day of January, 1873, until the third day of March, 1873. The cause was continued from the January until the April term

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of the court. On the tenth day of April, the defendant moved the court to quash the indictment: 1. Because it appeared on the face of the indictment, that the same was found and returned after the time fixed by law for holding the January term of the court had expired. 2. Because the grand jury which found the indictment had no legal power and authority to find and return the said indictment. This motion was overruled by the court, and the defendant excepted.

The defendant then pleaded in abatement, that the court ought not to take cognizance of the charge of larceny, in the said pretended indictment, because, protesting that she is not guilty of the same, nevertheless, she says that the said grand jurors, naming them, by whom the indictment was found, etc., at the pretended and so called adjourned March term of said court, were not all of them, nor any one of them, at the time they so acted, and at the time the said pretended indictment was found, etc., duly, and legally qualified to act as such grand jurors of the Floyd criminal court; that the said January term, 1873, of said court had been held and continued for the time prescribed by law, and more than four weeks had elapsed since the 6th day of January, 1873, in this, to wit, that under and by the act of the General Assembly, etc., of April 13th, 1869, the criminal circuit court, in the county of Floyd, etc., was begun on the first Monday, being the 6th day of January, 1873, and by the second section of said act could continue only four weeks from said day; that on the said 6th day of January, 1873, the grand jury was empanelled and sworn, etc., and entered upon the discharge of their duties, and during the period of four weeks thereafter, they sat and acted as such for a period of ten days within a period of four weeks; that the said grand jurors, or any nine or more of them, did not find and return, etc., said indictment, during the said ten days, or at any time during the four weeks commencing on the 6th day of January, 1873, and immediately following, and that said indictment was found on the 8th day of March, 1873,

and not before; wherefore, etc. The plea was verified by the oath of the defendant.

A demurrer to this plea was filed by the State, alleging that it did not state facts sufficient to constitute a good plea in abatement. The demurrer was sustained by the court, and the defendant excepted. The defendant then pleaded not guilty, there was a trial by jury, a verdict of guilty, a motion for a new trial and in arrest of judgment overruled, and exception, and judgment according to the verdict. The reasons in the motion for a new trial were, the overruling of the motion to quash the indictment, that the verdict was contrary to law, and because the verdict was contrary to the evidence. The grounds of the motion in arrest of judgment were, that the pretended grand jury which found the indictment had no legal authority to inquire into the offence charged, by reason of its not being within the jurisdiction of the court, and that the facts stated do not constitute a public offence.

The errors assigned are the following: 1. Overruling the appellant's motion to quash the indictment. 2. Sustaining the demurrer to the plea in abatement. 3. Overruling the motion for a new trial; and, 4. Overruling the motion in arrest of judgment.

The only question which is discussed by counsel for the appellant is the question as to the authority of the grand jury to find and return the indictment at the time when it was found and returned. Counsel say that no other question is intended to be presented, either by the motion to quash, the plea in abatement, the motion for a new trial, or that in arrest of judgment. The question arises upon the construction of the act creating the criminal court in Floyd and Clark counties, 3 Ind. Stat. 178, and the act, as amended, relating to grand jurors. It is provided in the second section of the act organizing the court, that the court shall sit in Floyd county on the first Mondays in January, April, July, and October, in each year, and that each of said terms shall be and continue for four weeks, if

the business thereof shall require it, and during said terms said court shall be open at all times for criminal trials alone.

In the fourteenth section of the act relating to grand jurors, as amended, 3 Ind. Stat. 280, it is expressly provided, that the grand jury in the criminal court shall sit each month, and not more than ten days in each month. It will be observed that the law does not forbid the grand jury from sitting more than ten days at each term of the court, but the provision is, that they shall not sit more than ten days in each month. The law does not provide for a grand jury for each month of the year, during which, or any part of which, the court may be in session, 2 G. & H. 402, but does provide for a grand jury for each term; and we think that if the court, at the same term, can legally be in session in two months, the same grand jury may sit in each month during which the court may legally sit. It appears that the court began its January session on the 6th day of January, which was the first Monday. Its four weeks session would end on the thirty-first day of the month. But instead of sitting continuously, except Sundays, until that date, it sat until the twentieth day of the month, leaving ten days excluding Sunday of the time yet to come, when it adjourned until Monday, the 3d day of March. We suppose that the point on which the case must turn is, whether or not the court had the power thus to adjourn, and to meet again on the day to which it adjourned, and continue in session until it had completed the four weeks. If it had, then we think, as we have already said, that the grand jury might legally meet in connection with it, and remain in session, if the court could continue in session so long, for ten days during that month, the month of March. It is provided by the statute organizing said criminal court, 3 Ind. Stat. 178, sec. 1, that said court shall, "in all things not otherwise provided by law, be governed by the law in force in regard to circuit courts." It is provided by the act of February 12th, 1855, 2 G. & H. 11, "that if at the close of any term of the circuit court of any county, or when it shall become necessary or

proper for said court to adjourn from any cause, the business pending therein shall not be finished, it shall be lawful for such court to adjourn until some other certain time, to be specified in the adjourning order, of which public notice shall be given in some manner, to be specified by said court, and at such time, such court shall meet and continue in session so long as the business shall require, and such adjourned term shall be deemed a part of the regular term of such court." The court, when it adjourned on the 20th of January, 1873, provided for giving notice of the adjourned term. When the court reconvened on the 3d day of March, and the grand jury reappeared, they might, as they had not sat during that month for any time, legally be in session for ten days in that month, and find and return the indictment on the 8th day of March, 1873, the day on which it was found and returned. Conceding that the court, at the adjourned session, could only sit so long as to fill out the four weeks which fix the length of its term, which we do not decide, and still the court had not at that time, including both sittings, been in session for the full term of four weeks.

But it is contended that if the court could adjourn, the record does not show that any of the conditions existed, upon the happening of which the court had the right to adjourn. If, in any case, this court would go into an inquiry on this subject, it need not do so in this, for the reason that nothing appears on the subject, and we must, in this as in every other such case, presume in favor of the action of the criminal court. It does not appear in the order of adjournment for what reason the court adjourned, and although the court ordered notice of the adjourned term to be given, it does not appear that it was given. It was decided by this court, in *Casily v. The State*, 32 Ind. 62, that the reason for the adjournment to a day, in vacation, need not be stated; that the act only requires it in adjournment to the next regular term, and that as to adjournments to the next regular term, whether the reason stated be sufficient or not, it could not injuriously affect suitors, by putting it out of the power

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of the court, at the next regular term, to proceed with the business, which ought previously to have been done. If the defendant in this case could raise the question as to whether the notice of the adjourned term was given or not, she ought to have made the objection in the criminal court, and cannot raise the question here for the first time, especially as the record is silent on the subject as to whether the notice was given or not. The case of *Casily v. The State, supra*, related to an order of adjournment to a day in vacation, and not to an adjournment to the next regular term, and the ruling in that case was, in effect, the overruling of the cases of *Shiel v. Maffett*, 17 Ind. 316, *Slaughter v. Gregory*, 16 Ind. 250, and any other cases which hold that in the order of the court adjourning to a day in vacation, the reason for the adjournment must be stated, and we regard them as overruled.

The judgment is affirmed, with costs.

J. H. Stotsenburg, for appellant.

J. C. Denny, Attorney General, for the State.



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CAMPBELL ET AL. v. ROUTT, ADMINISTRATOR.

PLEADING.—Counter-Claim.—Written Instrument.—Where a written contract is set out in a complaint and is the foundation of the action, the defendant, in setting up a counter-claim against the plaintiff upon the same contract, and seeking a judgment thereon in his own favor, must set out in his own pleading the original or a copy of the contract.

SAME.—Answer in Bar.—Counter-Claim.—No single pleading can be made to perform the double function of alleging matter in bar of an action brought by one party, and at the same time set up a cause of action in favor of the adverse party.

SAME.—Counter-Claim.—If a pleading alleges facts arising out of, or connected with, the plaintiff's cause of action, as the foundation of a claim in favor of the defendant against the plaintiff, and claims a judgment against the plaintiff for

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damages, or claims other affirmative relief, the pleading must be regarded as a counter-claim, and nothing else.

SAME.—*Failure to Demur.*—A counter-claim is a complaint, within the spirit and intent of the statute providing that the objection that a complaint does not state facts sufficient to constitute a cause of action is not waived by a failure to demur thereto.

SAME.—A counter-claim, like any other pleading, should be good by itself without aid from other pleadings in the cause or exhibits contained therein, where such exhibits are in no manner adopted and made a part of such counter-claim.

SAME.—*Demurrer.*—That a pleading does not “state facts sufficient to bar the action,” and that it does not “state facts enough for a counter-claim,” are not grounds of demurrer known to the statute.

APPEAL from the Sullivan Circuit Court.

WORDEN, J.—This was an action to review the proceedings and judgment in a cause in that court, wherein the appellants were plaintiffs, and the appellee was defendant, judgment having been rendered for the appellee for the sum of one hundred and ten dollars on a counter-claim by him pleaded. The review was sought on the ground of error of law appearing in the proceedings and judgment, in overruling a demurrer to the counter-claim, and in rendering judgment for the defendant thereon. Demurrer sustained to the complaint for review, exception, and final judgment for the defendant.

The original action was brought by the appellants against John I. Milam, but, pending the proceedings, he died, and his administrator was substituted.

The complaint in the original action alleged, in substance, that on November 22d, 1862, the plaintiffs and defendants therein entered into a written contract, a copy of which was set out, whereby the defendant agreed to sell and deliver to the plaintiffs, at Washington, Daviess county, on or before March 15th, 1863, twenty-nine thousand pounds of tobacco, of the quality therein described, to be prized in good order; for which the plaintiffs agreed to pay at the rate of thirteen dollars per hundred.

That, although the plaintiffs had paid one thousand and fifty dollars on the contract, the defendant had not delivered the tobacco or any part thereof.

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The counter-claim admits the execution of the written contract mentioned in the complaint therein, but alleges that after its execution, viz., on March 1st, 1863, Peter A. Campbell, one of the plaintiffs therein, agreed that the time for delivering the tobacco should be extended until May 1st, 1863, and informed the defendant that he would probably want the tobacco delivered at Mitchell, in the county of Lawrence, instead of the place mentioned in the written contract, and directed the defendant to hold the same, promising to let him know, within a few days, when and where he would want it delivered; and at the same time Peter A. agreed to send an inspector into Greene county, where the tobacco was to be prized, to superintend the prizing thereof, and the tobacco was not to be prized or delivered until such inspector should come to superintend the prizing thereof.

That said Peter A. never at any time informed the defendant when or where he wanted the tobacco delivered, nor did he send an inspector to superintend the prizing thereof, but wholly failed to do so.

That the defendant had a sufficient quantity of the requisite quality of tobacco prepared, ready to deliver at any time and place that said Peter A. might have designated in pursuance of the above mentioned arrangement; that if the subsequent arrangement had not been made, he would have delivered the tobacco as provided for in the original contract; that the defendant was, at all times, from March 1st to June 15th, 1863, ready to deliver the tobacco, on which last mentioned day the said Peter A. declined and refused to receive the tobacco at all; that on the day of such refusal tobacco was only worth six dollars per hundred pounds; wherefore the defendant was damaged in the sum of two thousand and thirty dollars. Judgment was prayed for nine hundred and eighty dollars.

This paragraph was demurred to on the double ground that it did not state facts sufficient to bar the action, and that it did not "state facts enough for a counter-claim."

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The demurrer having been overruled, issue was taken on the pleading, and the cause was tried by the court, resulting in a finding and judgment for the defendant as above stated.

It is objected, among other things, that the counter-claim was bad, because it did not set out a copy of the original written contract, which had been thus changed by parol as to the time for the delivery of the tobacco. We are not referred to any authorities upon this point, nor are we advised that the question has been passed upon by this court.

We have seen that the written contract was set out by copy in the complaint. It thus became a part of the plaintiffs' pleadings. It is quite clear that the foundation of the counter-claim attempted to be pleaded was the written contract as alleged to have been modified by parol; and that, leaving out of view the written contract, the pleading failed to aver facts sufficient to justify a recovery thereon.

The question is presented whether, where a written contract is set out in a complaint, being the foundation of the action, the defendant in setting up a counter-claim against the plaintiff, upon the same contract, seeking a judgment thereon in his own favor, must set out in his own pleading the original or a copy of the contract.

A counter-claim is defined by our statute to be "any matter arising out of, or connected with the cause of action, which might be the subject of an action in favor of the defendant, or which would tend to reduce the plaintiff's claim or demand for damages." 2 G. & H. 91, sec. 59. As thus defined, counter-claims may be divided into two classes, though in both they must arise out of, or be connected with, the cause of action, viz.:

1. Such as are based upon matters that may be the subject of an action in favor of the defendant against the plaintiff.

2. Such as embrace matters that go merely in mitigation of damages.

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It may be remarked, in passing, that by the New York code, counter-claims have a definition differing in some respects from that given by ours. Note *f* to 2 G. & H. 91. *Vassear v. Livingston*, 13 N. Y. 248.

A counter-claim of the first class, as above divided, though classed as an answer (2 G. & H. 88), is evidently, like a set-off, in the nature and performs the office of a complaint; and it must allege facts sufficient to entitle the defendant, who is really a plaintiff so far as the counter-claim is concerned, to recover a judgment against the plaintiff, or it will be subject to demurrer. It is provided by statute, in relation to this class of counter-claims, that the dismissal of the original action shall not have the effect of dismissing the counter-claim, but the defendant has the right to proceed to the trial thereof. 2 G. & H. 217, sec. 365.

A set-off or a counter-claim is expressly declared to be within the meaning of our statute requiring that when any pleading is founded on a written instrument, the original or a copy thereof must be filed with the pleading. 2 G. & H. 104, sec. 78.

This statute cannot be construed to have reference to cases merely where the contract should not be made a part of the complaint by original or copy, because the counter-claim must arise out of, or be connected with, the cause of action, and in all cases where a written contract is the foundation of the action, the original or a copy of the contract must be made a part of the complaint. The statute is imperative that when a counter-claim is founded on a written instrument, the original or a copy thereof must be filed with the pleading.

To hold that the written instrument or a copy thereof might be dispensed with in a counter-claim, because the instrument has been filed with the original complaint, would be in plain violation of the statute.

Keeping in view these statutory provisions, and considering that the counter-claim pleaded attempted to set up a cause of action in favor of the defendant against the plaintiffs, founded on the written contract, we are of opinion that

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the pleading was defective in not making the original or a copy of the contract a part of the pleading.

It is suggested that the pleading may have alleged sufficient facts to bar the plaintiffs' action, and yet not sufficient to maintain an action by the defendant against the plaintiffs; and we suppose it was with a view to save any question that might arise in this respect, that the double ground of demurrer, before mentioned, was assigned. We are of opinion, however, that no single pleading can be made to perform the double function of alleging matter in bar of an action brought by one party, and at the same time of setting up a cause of action in favor of the other. This would confound all our ideas of the office and purpose of pleading, and destroy the order, harmony, and practical usefulness of the system. The statement of a defence to an action is one thing. The statement of a cause of action in favor of the defendant against the plaintiff in that action is another and very different thing. Whether the pleading in any given case is one thing or the other must be determined from the character of the pleading and the averments thereof, but it cannot be both. Nor can it assume a protean character, and be one thing or the other as the varying circumstances in the progress of a cause may make it best subserve the interests of one or the other of the parties.

If the pleading alleges facts arising out of, or connected with, the cause of action, as the foundation of a claim in favor of the defendant against the plaintiff, and claims a judgment for damages in favor of the defendant against the plaintiff, or for other affirmative relief, the pleading must be regarded as a counter-claim and nothing else. The pleading in question here was a counter-claim, and not an answer in bar of the plaintiffs' action. It was a counter-claim attempting to set up a cause of action in favor of the defendant against the plaintiffs, and not matter in mitigation of the plaintiffs' damages. It was so regarded by the court below, being the only foundation of the judgment rendered in favor of the defendant against

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the plaintiffs. Such a counter-claim must state facts sufficient to constitute a cause of action in favor of the defendant against the plaintiff, or it will be subject to a demurrer.

This brings us to the consideration of the causes assigned for the demurrer.

The first may be disregarded as inapplicable to the pleading, which was not in bar of the action. The second, that the pleading did not "state facts enough for a counter-claim," is one not known to the statute, and should perhaps be regarded as not raising any question as to the validity of the pleading. *Lane v. The State*, 7 Ind. 426; *Tenbrook v. Brown*, 17 Ind. 410. The cause of demurrer should have been, that the pleading did not state facts sufficient to constitute a cause of action. A demurrer to a complaint assigning for cause, that it did not state facts sufficient for a complaint, would seem, under the statute and the rulings thereon, to be insufficient, but it would be quite as appropriate as a demurrer to a counter-claim because it did not state facts enough for a counter-claim. But whether any cause of demurrer was well assigned or not, the question of the sufficiency of the pleading, regarding it as a counter-claim, is before us. The objection, that a complaint does not state facts sufficient to constitute a cause of action, is not waived by a failure to demur thereto. 2 G. & H. 81, sec. 54. A counter-claim of the character of that under consideration is a complaint within the spirit and intent of the statute. The complaint for review assigns for error, in the proceedings sought to be reviewed, among other things, the rendering of judgment for the defendant for one hundred and ten dollars on his counter-claim; and also that the counter-claim does not state facts sufficient to sustain the judgment. These assignments are sufficient to question the sufficiency of the facts set up in the counter-claim. The counter-claim, regarded as a complaint, is clearly defective for the want of a statement of sufficient facts. It not only does not contain the original or a copy of the written con-

tract, but it does not in any manner adopt and make a part thereof the copy set out in the original complaint; nor does it contain averments that embody the substance of the written contract and make it the foundation of the pleading. It admits, to be sure, the execution of the contract mentioned in the complaint, but that admission does not make the contract a part of the pleading, for the purpose of making it the foundation of the counter-claim. Reference would still have to be made to the complaint to ascertain what contract was admitted to have been executed, and the terms thereof. A counter-claim, like other pleading, should be good by itself without aid from other pleadings in the cause, or from exhibits contained therein, where such exhibits are in no manner adopted and made a part of such counter-claim.

Without the written contract, as we have seen, the pleading was radically defective.

This case differs from that of *Train v. Gridley*, 36 Ind. 241, as in that case the error complained of was waived by a failure to except.

Here, as has already been stated, the failure to demur to the pleading was not a waiver of the objection that it did not state facts sufficient, etc. We quote the following passage from the opinion in the case above cited, p. 248:

“It seems to be settled by authority and on principle, that a judgment cannot be reviewed for error of law appearing in the proceedings and judgment, unless there was an objection and exception to the ruling of the court, which is sought to be reviewed, where the question would be waived where there was no exception. But this rule would [not] apply where there was no waiver.” By a typographical error, or perhaps by an inadvertent omission in the manuscript opinion, the negative word “not” is left out of the last clause in the paragraph quoted, in the volume from which we quote, but we have supplied the omission in the quotation, in accordance with the evident meaning as gathered from the context.

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We are of opinion, for the foregoing reasons, that the demurrer to the complaint for review should have been overruled.

The judgment below is reversed, with costs, and the cause remanded, with instructions to the court below to proceed in accordance with this opinion.

J. M. Allen and W. Mack, for appellants.

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NEW TRIAL.—Motion.—Instructions to Jury.—The statement as a cause in a motion for a new trial in a criminal action, that the court misdirected the jury in a material matter of law (the attention of the court not being directed to the objectionable instruction, and no exception being taken to the instructions, the charge to the jury consisting of several distinct propositions), is too vague and uncertain to raise any question.

APPEAL from the Warrick Circuit Court.

OSBORN, C. J.—The appellant was indicted for an assault and battery with attempt to commit a rape. He pleaded not guilty, was tried by a jury, found not guilty of the attempt to commit a rape, and guilty of the assault and battery, and the jury assessed his fine at seven hundred dollars, and over a motion for a new trial, judgment was rendered against him on the verdict.

The reasons for a new trial stated in the motion are:

The said verdict is contrary to law.

The said verdict is not supported by sufficient evidence.

The fine is excessive.

The court misdirected the jury in a material matter of law.

The error assigned is, that the court erred in overruling the appellant's motion for a new trial.

The appellant makes but one point for the reversal of the

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cause, and that is an alleged erroneous charge to the jury. There was no exception to the charge, and we cannot review it. If a defendant in a criminal case wishes to have a question reviewed in this court, he must except to the ruling of the court below at the time of the decision. *Hornberger v. The State*, 5 Ind. 300; *Wheeler v. The State*, 8 Ind. 113; *Leyner v. The State*, 8 Ind. 490.

The reason assigned, that the court misdirected the jury in a material matter, without in some manner directing the attention of the court to the objectionable charge, where no exceptions had been taken to the instructions, was too vague and uncertain to raise any question. The charge of the court consisted of several distinct propositions. The motion did not include the whole charge.

We have, however, considered the instruction complained of, in connection with the evidence and the second reason for a new trial, that the verdict was not supported by sufficient evidence, for the purpose of determining whether it operated to the prejudice of the appellant with the jury, and we are satisfied that it did not. We think the case was fairly presented to the jury, and that their verdict was fully sustained by the evidence. Nor do we think the fine excessive. The counsel for the appellant say: "No harm was done her, yet the defendant, by the action of the jury, was fined in a large sum of money. The result of the trial seems to indicate considerable feeling against the defendant." The testimony of the girl upon whom the assault was committed, if believed, was calculated to excite, not only a considerable feeling, but a good deal of indignation against him. Judging from the verdict, the jury did believe her. Under pretence of taking her to a dance, she had been taken to a house from which the family were temporarily absent, and there, he and his co-defendant, by threats and persuasions, had endeavored to persuade her to yield to their embraces and gratify their lusts, and when they committed the assault she cried and screamed until they desisted. A neighbor who found her in the house with them heard her

crying and declaring that she would not stay there, when he was seventy or eighty yards from the house. To this neighbor the appellant stated what his purpose had been, and that he had been mistaken about the character of the girl. The experiment, it is true, is an expensive one, but it may be useful to the appellant. With the evidence before us, we cannot say that the fine is excessive.

The judgment of the Warrick Circuit Court is affirmed, with costs.

C. Denby and *I. S. Moore*, for appellant.

J. C. Denny Attorney General, and *A. L. Robinson*, for the State.

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CRIMINAL LAW.—*Former Acquittal.—Special Plea.*—To an indictment for murder in the first degree for the killing of A., the defendant entered a special plea in bar, wherein she alleged that she had been indicted for murder in the first degree for killing one B.; that she had been tried by a jury upon said indictment for the killing of B., after having taken issue thereon by a plea of not guilty as charged therein; and that upon such trial she was found guilty of murder in the second degree, and sentenced to the state prison for life; by which finding and judgment she was acquitted of the charge of murder in the first degree as charged in said indictment; and the crime charged in said indictment, for which she was tried and acquitted, “was and is identical in all its parts, incidents, and circumstances, with the crime charged in the indictment for the killing of” A.; “that the evidence whereby alone the State will attempt to prove the indictment in this cause is the same and nowise different from that employed and produced upon the trial of the indictment on which she was acquitted of murder in the first degree; and this she is ready to verify,” etc.

Held, that the plea was good.

Held, also, that the plea stated in effect that the same act caused the death of A. and B., and if the same act resulted in the death of both, there was but one crime.

Held, also, that it was not necessary that the plea should show that A. and B. were one and the same person.

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| 42 | 420 |
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| 154 | 248 |
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| 159 | 398 |
| 42 | 420 |
| 163 | 462 |

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MURDER.—*Acquittal.*—If upon an indictment for murder in the first degree, the defendant is found guilty of an inferior grade of homicide, without saying any thing as to the higher grade, the finding is by implication an acquittal of the higher grade.

SAME.—*Killing of two Persons by the Same Act.*—Where two or more persons are killed by the same act, the State cannot indict the guilty party for killing one of the persons and after a conviction or acquittal indict him for killing the other.

PLEADING.—*Plea of Not Guilty.*—*Special Plea.*—The privilege given by statute (2 G. & H. 413, sec. 97), that in all criminal prosecutions the defendant may plead the general issue orally, and under it every matter of defence may be proved, does not take away from him the right to plead specially any defence which before that enactment might have been specially pleaded.

SAME.—*Special Plea in Bar.*—*Trial.*—A defendant in a criminal prosecution may plead specially a former acquittal or a former conviction in bar, and have the issue or issues joined on such plea tried separately and apart from the question of the guilt or innocence of the crime charged in the pending indictment.

SAME.—If the issue or issues joined upon a plea of former acquittal or conviction are found against the defendant, he may still enter a plea of not guilty.

SAME.—*Judgment.*—The judgment upon a plea of former acquittal or conviction, when the issues have been found against the defendant, is that he answer over.

SAME.—Upon the general issue only can a defendant in a criminal prosecution be found guilty and subjected to the penalty of the law.

SAME.—It is optional with a defendant in a criminal prosecution whether he will plead a former acquittal or conviction specially, or give the same in evidence under the plea of not guilty.

SAME.—*Practice.*—*Demurrer.*—The rule that it is not an available error that a demurrer has been sustained to a pleading, when there is another pleading under which the same evidence is admissible, is not applicable in criminal cases.

SAME.—*Demurrer.*—In determining the sufficiency of a plea of former acquittal or conviction, to which a demurrer has been sustained, the court cannot regard the evidence that was afterward given on the trial of the cause upon a plea of not guilty.

INSTRUCTIONS.—*Exculpatory Facts.*—On the trial of a criminal cause, it was error to instruct the jury, that if there were other facts not before them, which were exculpatory in their character, and they could have been proved by the defendant but were not, the jury might consider such failure with the other circumstances offered to show the guilt of the defendant.

SAME.—The jury were instructed as follows: "Remember that you are each responsible for the verdict you shall render, not forgetting, however, that no man can safely consider himself infallible, that no number of minds can agree upon a multitude of facts, such as this case presents, without some yielding of the judgment of individuals upon the evidence, some deference to the opinion of others, without what some might call compromise of dif-

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ferent views. No man who is unwilling to do this within reasonable limits, and without a sacrifice of conscience, ought to have a place in the jury box or be a member of any deliberative body."

Held, where the indictment was for murder in the first degree, and the evidence was all circumstantial and tended to prove murder in the first degree only, and there was a verdict of guilty of murder in the second degree, with a recommendation to executive clemency, that the charge was erroneous.

NEW TRIAL.—*Effect of Granting a New Trial.*—The legal effect of granting the appellant in this cause a new trial must be decided by the court below before it can properly be passed upon by the Supreme Court.

STATUTE CONSTRUED.—*Technical Error.*—To deprive a defendant in a criminal prosecution of the right to plead a former acquittal or conviction by a special plea, and to have the issue thus tendered tried first, and, if found against him, to have another jury try the issue on a plea of not guilty, is not a technical error within the meaning of sec. 160, 2 G. & H. 427.

INSTRUCTIONS.—*Effect of.*—Although the jury in criminal causes are made the judges of the law as well as of the facts, the charge of the court is presumed to control their minds to some extent; and when the court has misdirected the jury in a material matter of law, such misdirection is a ground for a new trial.

SAME.—Where, from the whole case, it appears that the jury might have rendered a different verdict, it may well be considered that an erroneous instruction leading to the verdict influenced them, and is good ground for a new trial.

To that part of the original opinion holding that the special plea of the defendant was good, that the averments therein were sufficient to show that the two homicides were caused by the same act, OSBORN, C. J., on petition for a rehearing, dissented.

APPEAL from the Boone Circuit Court.

DOWNEY, J.—This was an indictment for murder in the first degree against the appellant, and Silas Hartman, and William J. Abrams, found and returned by the grand jury in the Marion Criminal Court. It is stated that the grand jurors of the county of Marion and State of Indiana, impanelled, charged, and sworn to inquire of felonies and misdemeanors committed within the county of Marion, in said State of Indiana, on their oath, do present, charge, and find, that Silas Hartman, Nancy E. Clem, and William J. Abrams, all late of said county and State, and all being then and there of sound mind, on the 12th day of September in the year of our Lord one thousand eight hundred and sixty-eight, at said county of Marion and State of Indiana, did, with force

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and arms, unlawfully, feloniously, purposely, and with premeditated malice, make an assault upon one Jacob Young, then and there and in the public peace being, and did then and there, with force and arms, and with guns and pistols, and with leaden balls, shot, and slugs, then and there shot off and discharged by the said Silas Hartman, Nancy E. Clem, and William J. Abrams, from said guns and pistols, at and against the said Jacob Young, him, the said Jacob Young, then and there, unlawfully, feloniously, purposely, and with premeditated malice, touch, strike, bruise, and wound, then and there and thereby giving the said Jacob Young, in and upon the head of him, the said Jacob Young, one mortal wound of the length of two inches and of the depth of six inches, of which said mortal wound the said Jacob Young then and there instantly died. And so the jurors aforesaid, on their oath aforesaid, do say, that the said Silas Hartman, Nancy E. Clem, and William J. Abrams, the said Jacob Young, then and there, in manner and form aforesaid, unlawfully, feloniously, and with premeditated malice, did kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana.

A change of the venue was granted, on the application of the defendant, first from the judge of the criminal court, and then from the county of Marion to the county of Boone.

The defendant pleaded a former acquittal on another indictment charging her with the same crime. The State demurred to this plea, the demurrer was sustained, and the defendant excepted. She then pleaded not guilty, there was a trial by jury, and the jury failed to agree upon a verdict. At a subsequent term of the court, there was a second trial by jury, which resulted in a verdict of guilty of murder in the second degree, the jury returning with their verdict the following recommendation: "We, the jury, who have this day made our verdict in the case of *The State v. Nancy E. Clem*, recommend her to the clemency of the executive of the State in her behalf."

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The defendant moved the court for a new trial, her motion was overruled, and final judgment, of imprisonment for life, was rendered on the verdict. Two errors are assigned in this court.

1. The sustaining of the demurrer to the plea of former acquittal ; and,

2. The overruling of the motion for a new trial.

In the plea of former acquittal, the defendant alleges, that heretofore, on the 20th day of October, 1868, in the Marion Criminal Court, the grand jury, duly impanelled, sworn, and charged, etc., returned into open court an indictment, charging that Silas Hartman, Nancy E. Clem, the identical person now defendant in this action, and William J. Abrams, on the 12th day of September, 1868, at, etc., did, with force and arms, unlawfully, feloniously, purposely, and with premeditated malice, make an assault upon one Nancy Jane Young, then and there and in the public peace being, and did, then and there, with force and arms, and with guns and pistols, and with leaden balls, shot, and slugs, then and there shot off and discharged by the said, etc., from the said guns and pistols aforesaid, at and against the said Nancy Jane Young, her the said Nancy Jane Young, then and there, unlawfully, feloniously, purposely, and with premeditated malice, touch, strike, bruise and wound, then and there and thereby giving said Nancy Jane Young, in and upon the head of her, the said Nancy Jane Young, one mortal wound of the length of two inches, and of the depth of six inches, of which said mortal wound the said Nancy Jane Young, then and there instantly died. And so the jurors aforesaid on their oath aforesaid do say and find, that the said Silas Hartman, Nancy E. Clem, and William J. Abrams, the said Nancy Jane Young, then and there in manner and form aforesaid, unlawfully, feloniously, purposely, and with premeditated malice, did kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana. And she says that the said indictment was duly signed by the prose-

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cuting attorney, etc., endorsed by the foreman of the grand jury as a true bill, filed in open court, and duly recorded. And afterward, on the 23d day of October, 1868, etc., the defendant having been arraigned upon said indictment and required to plead thereto, for plea thereto then and there said, that she was not guilty as charged therein, and afterward, on the 9th day of February, 1869, etc., the said case being called in said court for trial, the parties proceeded to impanel a jury to try the same, and on the 10th day of February, 1869, etc., the State and the said Nancy E. Clem having elected twelve good and lawful men, resident householders of said county of Marion, the same were duly impanelled in and by said court, and sworn upon said jury according to law, and the said parties then and there and thenceforward proceeded in and by said court and jury to try said cause, and such proceedings were then and there had in said case, that afterward, on the 1st day of March, 1869, etc., the said jury returned into court the following verdict, to wit: "We, the jury, find the defendant guilty of murder in the second degree as charged in the indictment, and sentence her to be imprisoned in the State's prison during life." And afterward, on the 29th day of March, 1869, etc., the said court rendered judgment upon said verdict against the said defendant, in substance and effect as follows: It is therefore considered by the court that said defendant, Nancy E. Clem, for the offence aforesaid, be confined in the State's prison for life, and that she pay and satisfy the costs of said prosecution. And she avers and charges that by the verdict and judgment aforesaid thereon, she was fully acquitted of the charge of murder in the first degree as charged in said indictment, which will more fully appear, reference being had to the record of the proceedings and judgment aforesaid, which she makes part of this her plea, etc. And the said defendant avers that the crime charged against the defendant in said indictment, and of which she was tried and acquitted as hereinbefore set forth, by the verdict of the said jury, was and is identical in all its parts,

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incidents, and circumstances with the crime charged in the indictment first above in this plea specified, and to which this plea is now by her pleaded ; and that the evidence, whereby alone the said plaintiff can or will attempt to support and prove the indictment against her in this case, is the same, and nowise different from that employed and produced against her upon the trial of the indictment aforesaid ; in which trial she was acquitted as hereinbefore stated of the crime of murder in the first degree. And this she is ready to verify ; wherefore, etc.

The cause of demurrer to the answer was, that it did not state facts sufficient to constitute any good and sufficient plea to the indictment.

When there is a demurrer to a pleading, all the facts stated in the pleading, which are well pleaded, are to be taken as true for the purpose of determining the sufficiency of the pleading. The question is, does the pleading state facts sufficient to show that the defendant had been indicted in a court of competent jurisdiction, and tried and acquitted of the crime of murder in the first degree with which she is charged in this indictment? If so, then it is a right secured by the common law, and guaranteed by the constitution of this State, that she shall not be again put in jeopardy for the same offence. 4 Bl. Com. 335 ; Constitution of Indiana, art. I, sec. 14.

When a defendant is charged with the crime of murder in the first degree, he may be found guilty in that degree, or he may be convicted of murder in the second degree or of manslaughter, as the evidence may justify and require. 2 G. & H. 405, sec. 72 ; *Dukes v. The State*, 11 Ind. 557 ; *Kennedy v. The State*, 6 Ind. 485. If upon such an indictment the jury find the defendant guilty of an inferior grade of homicide without saying anything as to the higher grade, the verdict is, by implication, an acquittal of the higher grade of the crime. 2 G. & H. 417, sec. 110 ; *Weinsorpflin v. The State*, 7 Blackf. 186 ; *Brennan v. The People*, 15 Ill. 511 ; *Hurt v. The State*, 25 Miss. 378.

Two objections are urged to the plea, or to its allowance :

1. That it does not show that the crime of which the defendant was acquitted was the same as that for which she was about to be tried ; and,

2. That the same facts might have been given in evidence under the plea of not guilty.

It is urged that the plea should show by proper allegation that the person in this indictment alleged to have been killed is the same person who was alleged to have been killed in the indictment in the former prosecution. In other words, that, in order to make it good, the plea should have alleged that Jacob Young, mentioned in the indictment in this case, is the same person as Nancy Jane Young, the person alleged to have been killed in the indictment on which the defendant was previously acquitted. But evidently this cannot be so, else when two persons are killed by the same act, and when the crime would therefore be one and indivisible, and when the State had chosen to indict the defendant and try him for the killing of one of them, there could be no plea of former acquittal when he was indicted for the death of the other produced by the same act. When, however, but one person has been killed, and in the second indictment the defendant is charged with the same crime, then, if the two indictments do not, when brought together, show that the person, charged in the second indictment to have been killed, is the same person mentioned in the first, that fact must be expressly alleged in the plea. But, if we are right in our view of the case under consideration, it is not only not necessary that the plea should contain such an allegation, but it would be impossible, consistently with the truth, that it could do so. If it be true, as we suppose it is, that the killing of two or more persons by the same act constitutes but one crime, then it follows that the State cannot indict the guilty party for killing one of the persons, and after a conviction or acquittal indict him for the killing of the other ; for the State cannot divide that which constitutes but one crime, and make the different parts of it the bases

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of separate prosecutions. But when the State has prosecuted the accused for one part of the crime, she cannot again prosecute him for the other or remaining part of it. Hence, if the killing of Jacob and Nancy Jane Young resulted from the same act, and therefore one crime, and the State has prosecuted the accused for the murder of Nancy Jane Young, one part of the crime, it cannot again prosecute her for the murder of Jacob Young, the other part of the crime. The gist of the plea, therefore, in this case is, that the felonious act with which the defendant is charged in the indictment resulted in the death of both Jacob and Nancy Jane Young, and that the State, having prosecuted the defendant for part of the crime, should not prosecute for the other part.

The plea of former acquittal is very simple in its structure. It is said to be a plea of a mixed nature, and to consist partly of matter of record, and partly of matter of fact. The matter of record is the former indictment and acquittal, the matter of fact is the averment of the identity of the offence and of the defendant as the person formerly indicted. 1 Chit. Crim. Law, 459. There is no question made in this case as to the sufficiency of that part of the plea which sets forth the matter of record, that is, the former indictment and acquittal. But the objection is, that it does not sufficiently allege the identity of the felony charged in this case with that charged in the former case, of which the defendant was acquitted. The form of the allegation of identity in the precedents is very general. Consulting some of the forms, we find it stated as follows: "That the felony and murder in the said former indictment mentioned, and the felony and murder in this present indictment mentioned, are one and the same felony and murder and not divers and different felonies and murders." Whart. Preced. 1150. "And that the felony of which he, the said A. B., was so indicted and acquitted, as aforesaid, and the felony of which he is now indicted, are one and the same felony." Bicknell Crim. Prac. 120. Under this general allegation the evidence is

admissible to show whether the felonies are in fact the same or not.

The language of the plea, with reference to the identity of the crime, is not exactly that which is used in the approved precedents, but we think it is in effect the same. It states that the crime charged against the defendant in said indictment, and of which she was tried and acquitted, was and is identical in all its parts, incidents, and circumstances, with the crime charged in the indictment upon which she was about to be tried, and that the evidence, whereby the State could and would attempt to support and prove the same, is the same, and nowise different from that employed and produced against her upon the former trial. It seems to us that this language sufficiently shows that the crimes are the same. It does not follow because one of the indictments was for the murder of Nancy Jane Young, and the other for the murder of Jacob Young, that the crime is not the same. If the same act of the defendant resulted in the death of both of them, there was but one crime. Where, by the discharge of a fire-arm, or a stroke of the same instrument, an injury is inflicted upon two or more persons, or their death is produced, there is but one crime committed. In *The State v. Damon*, 2 Tyler, 387, the defendant was indicted for an assault and battery on one Doty, and pleaded a former conviction on a complaint for an assault and battery committed upon one Miller, alleging that the wounding of each was by the same stroke, and at the same time. The court said, in delivering its opinion: "It appears that the defendant wounded two persons in the same affray, at the same instant of time, and with the same stroke. On a regular complaint made, he has been convicted before a court of competent jurisdiction for assaulting, beating and wounding Frederick Miller, one of those persons. He stands here indicted for assaulting, beating and wounding Elias Doty, the other of those persons; and the defendant pleads in bar the former conviction, which he alleges to have been for the same offence. The only question is, whether the defendant has

been already legally convicted of the offence charged in the indictment. Of this there can be no doubt; for it is apparent on the record, that the assault and battery charged in the indictment, and that of which he was convicted by Mr. Justice Randall, were at the same place, and in the same affray, and the wounds made by the same instrument, and by the same stroke.

"This is not a question between either of the parties injured by the assault and battery and their assailant; redress has been or may be obtained by them by private action; but it is a question between the government and its subject, and the court are clearly of the opinion that the indictment can not be sustained. The indictment charges the defendant with having disturbed the public peace by assaulting and wounding one of its citizens. For this crime he shows that he has been legally convicted by a court of competent jurisdiction. He cannot, therefore, be again held to answer in this court for the same offence."

In *The State v. Williams*, 10 Humph. 101, the defendant was indicted for stealing a horse, saddle, bridle, blanket and martingale, and it was decided to be but one offence. And see *Laupher v. The State*, 14 Ind. 327. In the *State v. Nelson*, 29 Me. 329, it was held that where the goods of several persons were stolen at the same time, so that the transaction is the same, one count in the indictment may embrace the whole; and in *Commonwealth v. Williams*, Thacher Crim. Cas. 84, the same doctrine is laid down. The court in its opinion quote, with approbation, the language of Lord HALE, 1 P. C. 531, where he says: "For it seems to me that if at the same time, the party steal goods of A. of the value of 6d., goods of B. of the value of 6d., and goods of C. of the value of 6d., being perchance in one bundle, or upon a table, or in one shop, this is grand larceny, because it is one entire felony, done at the same time, though the persons had several properties, and therefore, if in one indictment, they make grand larceny."

A case more nearly in point is *Ben v. The State*, 22 Ala. 9, where the defendant was indicted for administering poison

at the same time to three persons. It was objected by counsel for the prisoner that the indictment was bad because it charged the commission of several offences in one count. 1. That the prisoner administered the poison to the persons named. 2. That he caused the same to be administered. 3. That he administered and caused it to be administered to three individuals. But the court said: "We have examined these objections to the indictment with much care, and are constrained to hold that they are not well taken." See, also, *Rex v. Benfield*, Burr. 980; Whart. Crim. Law, secs. 390, 391, 392, 393, and authorities there cited; and *Jackson v. The State*, 14 Ind. 327.

In the case under consideration, we regard the allegations of the plea of former acquittal as stating in effect that the same act caused the death of Jacob Young and Nancy Jane Young, and therefore as bringing the case within the rule established by the authorities to which we have referred.

The statute provides, that in all criminal prosecutions the defendant may plead the general issue orally, which shall be entered on the minutes of the court, and under it every matter of defence may be proved. 2 G. & H. 413, sec. 97. But this is a privilege conferred upon the defendant, and was not designed to take away from him the right to plead specially any defence which before the enactment of the section might have been specially pleaded. It is an affirmative statute and does not take away or abrogate the common law. It is expressly provided in the criminal code, that the laws and usages of this State relative to pleadings and practice in criminal actions, not inconsistent with the code, as far as the same may operate in aid thereof, or to supply any omitted case, are continued in force. 2 G. & H. 428, sec. 172. The defences which a defendant might plead specially in bar of the indictment were formerly of four kinds; a former acquittal, a former conviction, a former attainder, and a pardon. But as attainders are prohibited in this country, Const. U. S. art. 1, sec. 10, and as pardons are not granted until after conviction, State Const. art. 5, sec.

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17, the defences which a defendant may thus plead specially are reduced to two; a former acquittal, and a former conviction. It may be very important to a person charged with crime to plead specially a former acquittal or a former conviction in bar, and have that issue tried separate and distinct from the question of guilt or innocence of the crime charged in the pending indictment. This he is entitled to insist upon, and when the issue or issues thus formed are decided against him, he may still plead the general issue of not guilty. The judgment upon such plea, when it has been found against the defendant, is that he answer over. Upon the general issue only can he be found guilty, and be subjected to the penalty of the law. 4 Bl. Com. 338; 1 Chit. Crim. Law, 470, 435. It has been held that if a defendant plead a special plea, and also the general issue, it is error to compel him to go to trial on both at the same time. *Commonwealth v. Merrill*, 8 Allen, 545. The court say, in this case: "The argument for the Commonwealth is, that the defendant has not been injured, inasmuch as neither of the records, which he produced and offered in proof of his special pleas, showed a former conviction of the same offence for which he was then on trial," etc. "But the defendant had a right to a trial of his special pleas according to legal rules, and, as he did not waive that right, a majority of the court are of opinion that he has suffered a legal injury by being deprived of such trial." See 1 Bishop Crim. Law, sec. 438.

In this State, we think it is optional with the defendant, whether he will plead a former acquittal or a former conviction specially or give it in evidence under the general issue as authorized by the statute. If he elect to plead such defence specially, then it seems that he is entitled to have that issue tried before he is bound to plead the general issue. We are referred by counsel to civil cases, where it has been held that it is not an available error that a demurrer has been sustained to a pleading, when there is another pleading under which the same evidence is admissible. We think the rule is not

applicable in criminal cases, for the reasons already stated.

But it is urged that we may regard the evidence that was given on the trial of the cause upon the general issue which was pleaded after the sustaining of the demurrer to the plea of former acquittal, in deciding the question under consideration, and we are referred to 2 G. & H. 419, sec. 118, and 427, sec. 160. We are unable to see how we can do this. We cannot know that the evidence in the record bearing on this question is the only evidence which would have been introduced, had the defendant been allowed to try the issue presented by her plea of former acquittal. The question relating to the sufficiency of the plea was presented to the circuit court before the evidence was heard, and wholly disconnected from it. The court decided it insufficient. The question now comes before us, and we must decide it, as that court did, unaffected by the evidence which was afterward adduced upon the trial of another issue. If the crime was not the same as that of which the defendant had before been acquitted, the State had only to take issue upon the plea, and when it was found against the defendant, compel her to plead the general issue and go to trial upon the question of her guilt or innocence of the charge contained in the indictment.

If there was any other fact which could have been pleaded in avoidance of the plea, it was the privilege of the State, by her attorney, to plead the same by way of reply. We are of the opinion that the court erred in sustaining the demurrer to the plea.

The questions arising out of the overruling of the motion for a new trial are next to be considered. Among the objections urged against the regularity of the proceedings upon the trial, exception is taken to several portions of the instruction of the court to the jury. The following is the first which we shall notice: "If you have a reasonable doubt whether the material facts have all been given to you in evidence, and whether other relevant and material facts

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necessary to a right understanding of the case, or any part thereof, and not in evidence, exist, and whether such facts not in evidence might lead to the just conclusion that the defendant is not guilty, and you should believe that the State could have known and produced such evidence, then you ought to find the defendant not guilty. But, if you should believe that such other facts, if exculpatory in their character, could have been proven to you by the defendant, or that, if not guilty, she could have so explained those given in evidence as to show their consistency with her innocence, and has failed to do one or the other, then this failure may be considered in connection with the other circumstances offered to show her guilt. Conviction cannot be had, whether the defendant does or does not disprove any of the circumstances arrayed against her, unless the circumstances proved convince you, beyond a reasonable doubt, that she is guilty as charged in the indictment." In the first sentence of this charge the jury were told, 1. That if they had a reasonable doubt whether the material facts had all been given to them in evidence; 2. Whether other relevant and material facts necessary to a right understanding of the case, or any part thereof, and not in evidence, existed; 3. Whether such facts, not in evidence, might lead to the just conclusion that the defendant was not guilty; and 4. They should believe that the State could have known and produced such evidence; then, 5. They ought to find the defendant not guilty. It is contended by counsel for the appellant, that the giving of the charge in this form, making the acquittal of the defendant to depend upon the knowledge of the State of other evidence, and its ability to produce the same, was incorrect, for the reason that it is clearly to be implied or inferred, that if the State did not know of such additional evidence, and could not produce the same, the jury might then find the defendant guilty, even though the evidence left them in reasonable doubt of the defendant's guilt. In other words, that if the jury found the first four of the propositions embraced in the sentence to be true, they might then

acquit the defendant, and that, by necessary implication, if they did not find them all true, they must find her guilty.

In the second sentence of the charge there are two things referred to; first, other facts exculpatory in their character, which could have been proved by the defendant; and, second, that she was not guilty, and could have so explained those given in evidence as to show their consistency with her innocence. The first case supposed, that is, the failure to prove exculpatory facts, which the defendant could have proved, the jury is informed, may be considered in connection with other circumstances, offered to show the defendant's guilt. It relates to facts not proved by either party, but which the defendant might have proved. It proceeds upon the supposition that there are other facts which the defendant could have proved, that those facts are exculpatory in their character, and then states that if the facts, thus known to be exculpatory in their character, are not proved by the defendant, the jury may regard her failure to do so as evidence of her guilt.

The second proposition is, that if she was innocent, and did not explain the facts given in evidence against her so as to show their consistency with her innocence, the jury might regard her failure as evidence of her guilt. If she was not guilty, it is difficult to see how her failure to explain circumstances inconsistent with her innocence could make her guilty. In the first branch of the sentence, the court speaks of facts exculpatory in their character. In the second the court speaks of "those given in evidence," meaning, we suppose, not the exculpatory facts before spoken of, but the inculpatory or criminative facts which had been given in evidence by the State against the defendant. To these last facts we understand the third sentence of the charge to relate, in which the court informed the jury that conviction could not be had, whether the defendant did or did not disprove any of the circumstances arrayed against her, unless the circumstances proved convinced them, beyond a reasonable

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doubt, that she was guilty as charged in the indictment. It is quite clear, we think, that the court did not, in the last sentence of the charge, in speaking of circumstances arrayed against the defendant, allude to her failure to prove exculpatory facts, but left that part of the charge to stand as given in the second sentence of the charge. The jury were told then, without any modification or attempted correction, that if there were other facts, not before them, which were exculpatory in their character, and they could have been proved by the defendant, but were not, they might consider such failure with the other circumstances offered, to show her guilt. In *Doan v. The State*, 26 Ind. 495, the jury were instructed that, "when all the circumstances proved raise a strong presumption of the guilt of the accused, his failure to offer any explanation, where it is in his power to do so, tends to confirm the presumption of his guilt." In deciding the question as to the correctness of the charge, the court said: "This instruction was clearly erroneous. If the jury knew that it was in the power of the accused to offer an explanation of circumstances which, unexplained, raised a strong presumption of his guilt, that knowledge of his ability to explain these circumstances destroyed the presumption which would otherwise be indulged against the accused. The defendant was not to be convicted of burglary because he failed to satisfy the curiosity of the jury, by giving an explanation of circumstances which created no presumption of guilt against him, because the jury knew that he was able to explain them and thereby destroy any presumption which might have arisen, had the jury been uninformed of his ability to make such explanation." We are of the opinion that the instruction under consideration was erroneous and cannot be sustained.

The court also gave the following instruction to the jury: "Remember that you are each responsible for the verdict you shall render, not forgetting, however, that no man can safely consider himself infallible; that no number of minds can agree upon a multitude of facts, such as this case pre-

sents, without some yielding of the judgment of individuals upon the evidence, some deference to the opinions of others, without what some might call compromise of different views. No man who is unwilling to do this within reasonable limits, and without a sacrifice of conscience, ought to have a place in the jury box, or be a member of any deliberative body."

We hesitate to sanction this as a correct exposition of the law relating to the duties of jurors. The appellant was indicted of murder in the first degree. All the evidence was wholly circumstantial, and if it showed the guilt of the defendant at all, tended to show that she was guilty of murder in the first degree, and not of murder in the second degree. The jury found her guilty of murder in the second degree, and accompanied their verdict with a recommendation of the defendant to executive clemency. It has generally been supposed that such recommendations are made in those cases only, where the accused has been only in a slight degree culpable, or guilty only of a technical breach of the criminal law. It is almost certain that this charge of the court to the jury contributed largely to the result reached by them. How many of the jurors compromised by agreeing to a verdict of guilty of murder in the second degree, in consideration that their fellows would agree to the recommendation of the defendant to executive clemency, or how many agreed to the recommendation, in consideration that their fellows would agree to the verdict of guilty of murder in the second degree, we do not know. The State has no right to ask, and does not ask, that the sanctions of the criminal law of the State shall be visited upon any of her citizens until, by competent evidence, she has satisfied the honest and conscientious judgment of twelve of her citizens, acting as a jury, beyond a reasonable doubt, of the guilt of the accused. Each juror must act upon his own judgment of the facts as they are presented to him, in the evidence adduced, and cannot rightfully yield his honest convictions to those of some one else, or even to those of all the other members of the jury. If one juror is to

yield his judgment to that of another, there should be some mode of determining which of them may adhere to his judgment, and which must yield. It is inconvenient, in most cases, to have a jury disagree, and thus make it necessary that there should be another trial of the case, but this is a necessary consequence of trial by jury. A case which comes nearest to justifying the instruction in question is that of the *Commonwealth v. Tuey*, 8 Cush. 1. But the case does not go to the extent of warranting the instruction given in this case. In *Boydston v. Giltner*, 3 Oregon, 118, which was a civil action against a physician for malpractice, the court, in charging the jury, said: "Counsel both for the plaintiff and for the defendant have remarked upon the propriety or impropriety of what they term a compromise verdict. In regard to that, it is my duty to say to you, that jurors should carefully and patiently canvass and examine all the evidence, with an honest and conscientious effort to reconcile any differences of opinion they may entertain of the truth of the matters put in issue. And it is sometimes the case, when only dollars and cents are involved, when it is probable the exact truth can never be known, and when there is an honest difference of opinion among jurors, as, for an instance, when the matter between the parties is the state of their accounts, which have been loosely kept, and there is doubt as to the true balance, that concessions may be made for the benefit of both parties, which are not fully in accord with the individual juror's view of the facts proved. But in this class of cases, each party has a right to insist that the jury, and each juror, should render a verdict, if at all, literally 'according to the law and the evidence, as given on the trial.'"

It is the duty of jurors to consider carefully every part of the evidence, and, if necessary, reconsider it, and to hear and consider the views and arguments of their fellow jurors, but at last each one of them must act upon his own judgment, and not upon that of another. This seems to be the rule contemplated by the statute, which makes it a

good ground for a new trial, "when the verdict has been decided by means other than a fair expression of opinion, on the part of all the jurors." 2 G. & H. 424. sec. 142, division 3.

There are other questions presented and argued, arising out of the motion for a new trial, but as the full bench of this court has unanimously concluded that, for the reasons already stated, the judgment must be reversed, we do not regard it necessary to examine and decide the other questions to which we have alluded.

The judgment is reversed, and the cause remanded; and the clerk is directed to certify to the warden of the state prison south, to return the defendant to the jail of Boone county.

ON PETITION FOR A REHEARING.

OSBORN, C. J.—The counsel for the appellant raise the question of the power of the court to grant to the State a rehearing in this case. They say that the judgment of the court below having been reversed, and the warden of the State's prison having delivered her to the sheriff of the county under the order of this court in the judgment of reversal, we cannot by granting a rehearing remand her back to the state prison; that if we grant a rehearing and vacate our judgment reversing the judgment against her, the sheriff of Boone county, having once executed the judgment of the circuit court, by delivering her to the warden of the state prison, can have no power to take her there the second time on the same judgment after she has been delivered to him by the warden under a valid order of this court.

The counsel for the State ask that if we shall overrule the petition for a rehearing, for any cause, we will modify and change the opinion heretofore delivered, and that we will also express an opinion upon the effect of granting a new trial in the case, and decide, whether she must take it as to the whole case, or only as to the verdict of guilty of

murder in the second degree, leaving the verdict of not guilty of murder in the first degree to stand.

We all concur in the conclusion that the judgment of the court below was properly reversed, and that the petition for a rehearing ought to be overruled. Hence, we need not consider the question of power. We also concur in the opinion that we ought not to consider the question as to the effect of granting to the appellant a new trial, because the question is not before us. That must be decided by the court below, before it can be properly passed upon by this court. If we were to express an opinion upon it, the circuit court would not be bound by such opinion. We think it the safer and better practice for this court to avoid deciding questions not presented by the record. A majority of the court adhere to their rulings, and decline to materially modify the opinion.

I do not concur in the conclusion of the majority, that the opinion ought not to be materially modified. Since that opinion was delivered, and since the petition for a rehearing was filed, we have had the benefit of a full argument on the plea of former acquittal, as well as the other questions involved in the petition, and I can no longer concur or acquiesce in that part of the opinion which holds that the averments of identity of the two crimes are sufficient to show that the two homicides were caused by the same act. I do not consider it necessary to discuss the question at this time. I think no useful purpose would be accomplished by doing so. I only wish to state that I do not think the answer in that particular sufficiently certain, and in my opinion the demurrer to it was correctly sustained.

A majority of the court holding the answer good, we have concluded to add something to the former opinion on the question of the proper practice in such cases; and, also, as to a part of the instructions given to the jury.

Mr. Bishop, in his work on Criminal Procedure, vol. 1, p. 308, sec. 436, says, if two or more pleas involving issues to the jury are tendered together, they are not all necessa-

rily to be tried at once; and refers to the *Commonwealth v. Merrill*, 8 Allen, 545, in which METCALF, Judge, says: "The two issues of former conviction or former acquittal, and not guilty, are distinct, and both cannot rightly be submitted to a jury at the same time."

In *The King v. Captain Roche*, Leach, 160, he pleaded former acquittal. The prosecutor moved that the jury might be charged at once with the issue, and that of not guilty. The court said: "Charging them with both issues at once would lead to this absurdity, that being charged with both, they would be obliged to find upon both; and yet if the first finding was for the prisoner, they could not go to the second, because that finding would be a bar. They are distinct issues, and the jury must be separately charged with them."

Mr. Bishop, on p. 418, sec. 578, of the same volume referred to, says: "There are, indeed, some instances to be found in the reports, in which, by a sort of loose practice, the two issues have been submitted together; but, where this was done, and the jury returned a verdict of guilty without passing on the other issue, a judgment rendered on the verdict was held to be erroneous;" and refers to *Solliday v. The Commonwealth*, 28 Penn. St. 13. In that case, the loose practice referred to by Mr. Bishop had been adopted by the court, and both issues of former conviction on a special plea and not guilty were submitted to the jury at the same time. The jury returned a verdict of not guilty. The lower court refused to arrest the judgment and passed sentence upon the prisoner. The Supreme Court held that a former conviction could always be pleaded, and if its truth was established, it would be a plain bar to another judgment against the accused. If an issue of fact was formed upon the plea, it must go to a jury, and no judgment could be given in the case, until that case could be disposed of. No matter how clear the court may be against the defendant, nobody but the jury can decide an issue like that. If the jury should determine and find that the former indictment was for a different offence, and omit to find whether he was

guilty or not, he could not be sentenced, because he could not be punished without ascertaining his guilt. And for the same reason, he could not be sentenced without a verdict which would determine that he had not already been convicted for the same offence. On p. 15, the court says: "The jury have declared the defendant guilty, but that does not render the fact of his former conviction a whit more improbable than it was before." Judge BLACK, on p. 16, refers to the case of *The Commonwealth v. Demuth*, 12 S. & R. 389, as a case in point, and adds: "It is impossible for us to disregard a precedent so venerable without endangering the public confidence in our whole system of jurisprudence, for it all rests on *stare decisis*." In the case referred to, the prisoner pleaded not guilty, and former acquittal, upon which issue of fact was formed. Both issues were submitted to the same jury. The verdict was guilty, in the usual form. TILGHMAN, C. J., on p. 391, said: "The jury ought not to have been charged with both these issues at once, because, if they found for the defendant, on this plea of *autrefois acquit*, no further trial ought to have been had. A former acquittal was a bar to the present indictment." In a note to 6 Cox Crim. Cases, 181, the true rule is stated: "If there was in truth no such record, or an existent record were incorrectly set forth, he might simply deny its existence, and they would be triable by the court. If an existing record were correctly set out, but it did not apply in point of fact to the offence to which it was pleaded, the Crown would traverse the identity of the offences, and this issue would be submitted to the jury."

"When a defendant pleads former acquittal or conviction, and not guilty, both issues ought not to be put to the jury at the same time. * * * Until the issue upon the plea of former acquittal, or former conviction, is disposed of, there can be no trial in chief." *Henry v. The State*, 33 Ala. 389.

In the case of *The State v. Nelson*, 7 Ala. 610, a plea of former conviction was filed, after which an issue was formed upon the plea of not guilty and a jury impanelled and sworn;

after that the jury was discharged and the cause continued. The court, on p. 613, says that the practice was very loose, and adds: "It seems to have been assumed that the issue growing out of the plea of former conviction was to be submitted to the jury at the same time as the proof of the crime. All such issues, however, are collateral, and though they may be tried by the jury summoned to pass on the trial in chief, yet it is exceedingly irregular to submit them in connection with the inquiry as to the guilt or innocence of the accused." And again, on page 614, the court says: "The whole difficulty in this case is, that the jury was prematurely sworn and irregularly impanelled; as there could be no trial in chief, until the collateral issue or plea in bar was disposed of in some way. It is true, the prisoner might have waived the collateral issue, and then had a trial of the one in chief; but the court could not compel him to do so." And the court sustained a conviction at a subsequent term, holding that the accused was not in legal jeopardy by impanelling the jury to try the issue of not guilty, whilst the collateral one of former conviction was undisposed of, without the waiver of the accused. *Danneburg v. The State*, 20 Ind. 181, is referred to, as in conflict with the ruling in this case. The point was not raised in that case. It is expressly declared that the question of the sufficiency of the plea was not before the court. *Neaderhouser v. The State*, 28 Ind. 257, held, that, although the accused might give in evidence every matter of defence under the plea of not guilty, he was not prohibited from pleading specially, and the court also held that, inasmuch as he could properly give the same matter in evidence under the plea of not guilty, the case would not be reversed on account of an erroneous ruling in striking a special plea from the files. The facts stated in the special plea in that case tendered an issue of the guilt or innocence of the accused, and must have been tried at the same time with the one on the general plea of not guilty, whilst the issue tendered by the special plea in the case at bar was a collateral one, entirely

unconnected with the guilt or innocence of the accused, and as we have seen, could not be tried with the other. In that case the accused could not be prejudiced by striking out or sustaining a demurrer to the special plea. In the case at bar, it is clear that she would.

If such plea is tendered by the prisoner, and the prosecutor demurs to it, this is an admission that the record exists as pleaded. *Commonwealth v. Myers*, 1 Va. Cas. 188, 229, 232. A novel assignment is not admissible in a criminal case, and the proper and only mode of replying to a plea of former conviction is to traverse the alleged identity. *Duncan v. The Commonwealth*, 6 Dana, 295. To such a plea, a replication of an arrest of judgment is bad; it shows the indictment was defective, or that a conviction could not have been had upon it for the offence charged in the second indictment. *Henry v. The State*, 33 Ala. 389. Whenever the offences charged in the first and second indictments are capable of being legally identified as the same offence, by averment, it is a question of fact for the jury to determine whether the averments are supported and the offences the same. But when the plea of *autrefois acquit* upon its face shows that the offences are legally distinct and incapable of identification by averments, the replication of *nul tiel record* may conclude with a verification, and the court may decide the issue. *Hite v. The State*, 9 Yerg. 357; 1 Bishop Crim. Proced. 585, note.

But it is said, that even if the plea was a good one, the prisoner was not prejudiced by sustaining a demurrer to it, because, under the plea of not guilty, she could introduce the same evidence and make the same defence that she could under the special plea, and that on appeal the court must give judgment without regard to technical error or defects, or to exceptions which do not affect the substantial rights of the parties. And hence the judgment ought not to be reversed on account of sustaining the demurrer to that plea. But it must not be forgotten that the laws and usages of this State, relative to pleading and practice in criminal actions,

not inconsistent with the criminal practice act, as far as the same might operate in aid thereof, or to supply any omitted case, were continued in force. 2 G. & H. 428, sec. 172; *Hardin v. The State*, 22 Ind. 347; *Walker v. The State*, 23 Ind. 61. It had always been the privilege of a prisoner to plead former acquittal or conviction. We have seen that when pleaded, it was his right to insist upon the trial of that issue first. If that was found against him, he was entitled to another jury to try the issue on the plea of not guilty. To deprive him of that right is not a technical error or defect within the meaning of sec. 160, 2 G. & H. 427. It prevents him from having the issues tried separately, and of trying the issue on the special plea before he is put upon his trial on his plea of not guilty. It is not enough that the same testimony might have been given in evidence under the plea of not guilty. It is the separate trial that he is entitled to. In civil cases, all the issues of fact are submitted at the same time; whilst in criminal cases, as we have already shown, the prisoner is entitled to plead specially former acquittal or conviction, and have that issue tried first, unconnected with the issue of his guilt or innocence of the charge in the indictment. So that in civil actions, when the general denial is in, it is not an available error to sustain a demurrer to a good special answer, if the facts alleged would be admissible under the general denial, because the same jury would try the issues, whether formed by special plea or the general denial; and therefore no substantial rights of the party would or could be affected. In criminal cases, the error is an available one, because the issues are not properly triable at the same time. The prisoner is of right entitled to have each issue tried by separate juries. He has a right to two trials, and it cannot be said that his substantial rights are not affected, when he is deprived of that right.

The theory that a judgment in a criminal case must not be reversed, or the verdict of a jury set aside, unless it is unsupported by the evidence, or if it appears to be supported

by the evidence, is at war with the statute, the uniform practice of the courts, and the safety of the citizen. It substitutes the peculiar and particular ideas of justice of the court or judge in each case for well established rules, regulations, and practice. The erroneous rulings of the lower court could never be corrected, unless the court of appeals should determine from the evidence that the verdict of the jury was wrong, although the verdict might have been influenced largely by such rulings. The statute provides that the court must charge the jury upon all matters of law which are necessary for their information in giving their verdict. Among the causes, for which a new trial may be granted, are, when the verdict has been decided by means other than a fair expression of opinion on the part of all the jurors, and when the court has misdirected the jury in a material matter of law. Now in this case, the jury were told that "they must not forget that no number of minds could agree upon a multitude of facts, such as this case presents, without some yielding of the judgment of individuals upon the evidence, some deference to the opinions of others, without what some might call a compromise of different views." They were not only to defer to the opinions of others, but they were to yield their individual judgment upon the evidence, and if they could not do so within reasonable bounds, judgment of condemnation was pronounced against them in advance, as being unfit to have a place in the jury box, or to be a member of any deliberative body. To listen to arguments, to hear reasons, to have their attention called to the evidence, the arguments of counsel, the charge of the court; to do it all patiently and with an earnest desire to harmonize views and arrive at a correct conclusion, is entirely different from yielding the judgment upon the evidence. After all the consultations of the jury, each juror must render his verdict according to his own individual judgment. There can be no such thing as yielding that, without a sacrifice of conscience. There can be no limits within which it can be yielded; hence none can be

reasonable. There can be no standard by which to test what would be reasonable and what unreasonable. They were told, however, that they must yield their individual judgment upon the evidence within reasonable limits and compromise their different views, without in any manner indicating what would be reasonable limits. Each was left to judge for himself, and under the rule prescribed, each might yield enough of his judgment, to enable them to arrive at a conclusion and render a verdict which would not be according to the individual judgment of a single juror. The verdict in such a case would not be a fair expression of opinion on the part of the jurors, and the means by which it would be decided would be a yielding of opinions upon the evidence, under the erroneous instruction of the court.

The counsel for the State call our attention to the charge that the jury must not convict unless their minds were convinced of the guilt of the accused beyond a reasonable doubt; that they were directed to examine the evidence carefully and dispassionately; to bring to the exercise of that duty their best judgment, and return into court that verdict which should commend itself to their consciences, as being in exact accord with truth and justice. The statute requires the court to instruct the jury and state to them all matters of law which are necessary for their information in giving their verdict. 2 G. & H. 417, sec. 113. And although the jury are made the judges of the law as well as of the facts in criminal cases, the charge of the court is presumed to control their minds to some extent, in deciding the case and in arriving at a verdict; so much so, that when the court has misdirected the jury in a material matter of law, such misdirection is a ground for a new trial. 2 G. & H. 423, sec. 142, clause 4. This last charge must be taken in connection with the other, and in that they were told that it was their duty to yield their individual judgments upon the evidence, and make what might be called a compromise, in order to agree upon a verdict;

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and being guided by that instruction, the jury might consider it to be their paramount duty to agree upon a verdict.

If an erroneous charge is given, it "cannot be corrected by another instruction which may state the law accurately, unless the erroneous instruction be thereby plainly withdrawn from the jury. The effect of the conflicting instructions can only be to confuse the jury; and as they must follow one or the other, it is impossible to determine whether the influence of the court in such case has been exerted for good or evil." *Bradley v. The State*, 31 Ind. 492; *Clem v. The State*, 31 Ind. 480.

Exception is taken to the following language used in the opinion in this case: "It is inconvenient to have a jury disagree and thus render it necessary that there should be another trial of the case, but this is a necessary consequence of a trial by jury." We still think it better that parties should suffer the inconvenience and delay caused by a failure of the jury to agree upon a verdict, than that a verdict should be rendered against the judgment of a part of the jurors. The trial by jury in this State is based upon the theory that each juror is to decide upon the facts, as he understands them. Undoubtedly, jurors do make mutual concessions on minor matters. They are required to deliberate, decide, and make up their verdict by themselves, without aid or interference from anybody. How much each concedes, what compromises are made, what particular item of evidence is considered, or by what means the conclusion is arrived at, is not made known in the verdict. The twelve jurors must all agree upon the verdict, although they need not upon the reasons for it. Each must decide for himself. He ought not to be required "as a matter of law" to yield his individual judgment upon the evidence, in order to render a verdict. We fully appreciate the importance of a verdict in every case, but our anxiety for such a result must not be so great as to tolerate anything like dictation by the court towards the jury, or any

attempt to unduly control their action. They must be left to a free, voluntary, conscientious verdict. "There ought not to be anything in the conduct of the court toward the jury which would appear like pressing them to give up rational doubts or disregard difficulties which may arise in their minds upon the evidence of the case." *The State v. Austin*, 6 Wis. 205.

The history of jury trials shows frequent failures to agree, and yet we require a unanimous verdict. It has been considered better and safer to adhere to the system, to suffer the inconvenience of such failure, than to abandon it. But if jurors may be required by courts to surrender their judgment to their fellows, the theory of unanimous verdicts is practically abrogated, and the timid, conscientious juror will be controlled by the strong-minded and determined.

We cannot say that the evidence in this case so clearly and satisfactorily establishes the guilt of the accused, beyond a reasonable doubt, that the very decided language of the charge did not exercise a controlling influence upon the minds of the jury. It seems to us that the true rule is, that where from the whole case it appears that the jury might have rendered a different verdict, then we may well consider that an erroneous charge leading to the verdict influenced them, and is good ground for a new trial.

We do not consider it necessary to add anything to the opinion on the other branch of instructions.

The petition for a rehearing is overruled.

J. W. Gordon, D. W. Voorhees, W. W. Leathers, J. Hanna, F. Knefler, C. C. Galvin, and S. C. Wessner, for appellant.

B. Harrison, J. T. Dye, and J. C. Denny, Attorney General, for the State.

Hughes v. Osborn.

HUGHES v. OSBORN.

SUMMONS.—*Service by Copy.*—*Seal.*—When service of summons is made by leaving a copy at the last or usual place of residence, it is not necessary that the seal should be copied.

SAME.—*Motion to Set Aside.*—A summons will not be set aside because it requires the defendant to appear "in the Court of Common Pleas of Monroe County," and the complaint is entitled, "Common Pleas Court, Monroe County."

COSTS.—*Security for.*—*Non-resident.*—An action commenced by a non-resident will not be dismissed for want of security for costs, if the plaintiff, upon being ordered to do so, files an undertaking for the same.

ATTORNEY.—*Authority to Appear.*—If an attorney, who is ruled to produce his authority to bring a suit, files the affidavit of the plaintiff's agent that he was directed by the plaintiff to cause suit to be brought, and that he employed said attorney in pursuance of such direction, the showing of authority is sufficient.

INTEREST.—It is not a violation of the law relating to interest to compute the interest on an existing note and include it in a new note given for the debt.

PRACTICE.—*Interrogatories to Party.*—Where interrogatories have been filed and ordered to be answered, and afterward such order has been set aside by the court, the reason for setting it aside not being shown, this court will presume that the ruling was right.

APPEAL from the Monroe Common Pleas.

DOWNEY, J.—This action was by the appellee, as payee, against the appellant, as the maker of a promissory note. There was a motion to set aside the service of the process, a motion to quash the writ, a motion to dismiss the action, a motion to compel counsel for the appellant to produce and show his authority for appearing, a demurrer to the complaint, an answer in three paragraphs: first, the general denial; second, no consideration for the note; third, usury; demurrer sustained to the third paragraph of the answer, reply to the second, trial by jury, verdict for the plaintiff, motion by the defendant for a new trial overruled, and judgment for the plaintiff.

The several rulings of the court with reference to these matters, and with reference to an answer to certain interrogatories which were filed, have been assigned as errors.

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The motion to set aside the service was based upon the ground that the same was by copy of the summons left at the usual or last place of residence of the defendant, and that the copy did not show in any manner that the original thereof was sealed with the seal of the court.

The sheriff is not the keeper of the seal of the court, nor authorized to affix it to writs or the copies thereof. It could hardly have been anticipated by the legislature, when the sheriff was authorized to serve by leaving a copy of the writ, that he should attempt to copy the seal. It was held under the statute of 1843, and we think may well be held under the present statute, that the seal need not be copied. *Kelley v. Mason*, 4 Ind. 618. See, also, 2 G. & H. 63, sec. 37.

The motion to set aside the summons was for the reason that it required the defendant to appear in a different court from that in which the complaint was entitled. The complaint is entitled "Common Pleas Court, Monroe County, Aug. term, 1871." The summons required the defendant to appear "in the Court of Common Pleas of Monroe County, before the judge thereof," etc. We are unable to see any thing in this objection.

The motion to dismiss the action was based on the ground, that the plaintiff had not before the commencement thereof given security for the costs, he being a non-resident of the State. When the motion to dismiss was filed, accompanied with an affidavit of the non-residence of the plaintiff, he immediately gave the undertaking for the payment of costs in the usual form. The statute on the subject provides that the suit shall not be dismissed for want of the security, if the plaintiff will file, in open court, upon being ordered to do so, such undertaking. 2 G. & H. 228, sec. 402.

Upon affidavit filed by the defendant, the counsel of plaintiff was ruled to produce and show his authority for bringing and prosecuting the action. This he did by filing the affidavit of one Allen, who made oath that he was the agent of the plaintiff to collect the debt, that he was directed by the plaintiff to cause suit to be brought for its

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collection, and that in pursuance of such authority and direction he had employed the counsel who had brought and was prosecuting the action. It seems to us that there is no good ground to complain of this action of the court. The showing was sufficient.

The next alleged error is the overruling of the defendant's demurrer to the complaint. No particular objection to the complaint is pointed out, and it seems to us to be sufficient.

The sustaining of the plaintiff's demurrer to the third paragraph of the answer is the next error of which complaint is made. The paragraph of the answer alleges in substance that the note on which the suit is brought was given in payment of an open account and a certain other note assigned by one Smith to the plaintiff; that interest on said assigned note was computed to the date of the note sued on, and that the same was included with the principal of the said note and with the account, in the note sued on, thereby, as alleged, making the same usurious by compounding the interest; wherefore, etc. It is not a violation of the law against taking or contracting for illegal interest to compute the interest on a note, and either receive the amount, or include it in a new note given for the debt.

The defendant filed with his answer certain interrogatories for the plaintiff to answer, and the court made an order that the plaintiff should answer the same. Afterward the court set aside the order, but for what reason the bill of exceptions does not show. Most probably it was for want of the affidavit required by the statute, that the defendant expected to elicit facts by the answers material to him on the trial, etc. 2 G. & H. 189, sec. 303. We must presume, in the absence of the grounds on which the court acted, that the action was proper.

The last error assigned is, that the court improperly refused to grant a new trial on the motion of the defendant. The evidence is not in the record, nor is there any ques-

tion properly presented arising under the motion for a new trial.

We have thus examined all the alleged errors, and are clearly of the opinion that there is no error in the record.

The judgment is affirmed, with ten per cent. damages and costs.

A. Ryors, W. R. Harrison, and W. S. Shirley, for appellant.

F. H. Loudon, for appellee.

McCORKLE ET AL. v. SIMPSON.

INSTRUCTIONS TO JURY.—*Evidence*.—A court may refer to the evidence in a cause and present it to the jury in the summing up and charge, but the court should not show to the jury any leaning in favor of one of the parties.

APPEAL from the Vanderburg Circuit Court.

DOWNEY, J.—This was an action by the appellee against the appellants, to recover the amount of a bill of lumber furnished for the erection of a public school building, for the building of which McCorkle and Strong, two of the defendants, were contractors, and to enforce a lien for the amount due. The answer was, first, the general denial, and, second, payment. Reply in denial of the second paragraph of the answer. There was a trial by jury, a verdict for the plaintiff, a motion for a new trial overruled, and judgment on the verdict. The errors assigned involve the correctness of the ruling of the circuit court in refusing to grant a new trial. The evidence and instructions of the court to the jury are in the record by a bill of exceptions. The controversy was narrowed down to a

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few items or points by admissions made by the defendants upon the trial. One of these disputed questions was, whether the lumber was to be paid for in cash or only half cash and the other half in city bonds or orders. Upon this question the testimony of the plaintiff, Simpson, was that he sold the lumber for cash—sold below the market price because he was to get cash; that McCorkle said he was to take one-half in city bonds, but no difference, his was to be cash. McCorkle testifies, that Simpson agreed to take one-half of his pay in city bonds and one-half cash; that the bonds were worth only ninety cents to the dollar, and that Simpson refused to take them. One Rechtin, a witness for the defendants, testified that Simpson told him that he was to get one-half cash and the other half in city bonds or orders; that he was getting exactly such pay as McCorkle took from the city.

On this point the court instructed the jury as follows:

In reference to the manner in which the lumber was to be paid for, the plaintiff testifies that he sold the lumber below the market for the purpose of getting cash, while the defendant testifies that he was to pay for the lumber one-half in cash and one-half in city bonds worth less than cash, and you will have to determine between them. [The counsel for the defendant, interrupting, said, "Will your Honor tell the jury that the defendant is corroborated by Theodore Rechtin?" to which the court replied, and proceeded:] Yes, corroborated after a fashion; but about all Rechtin's testimony amounted to was, that Simpson said he was to take the pay for the lumber as McCorkle got it; that is, he first said Simpson said he was to take pay half cash and half city bonds, and then said Simpson said he was to take the pay just as McCorkle got it; but (the court proceeded) you will bear in mind that testimony of admissions and statements made a long time ago are to be taken with much allowance and great caution. The recollection of third parties, who had no interest in the subject, as to what was said a great while ago, is not so likely to be correct as is that of the par-

ties to the transaction themselves, who are interested and have reason to remember. The plaintiff and defendants being interested, their recollection of what was said and done is much more likely to be correct.

It seems quite plain to us that the jury must have understood from the form and manner of this instruction that they were to give little or no weight to the evidence of Rehtin. While we do not doubt that the court may refer to the evidence in the case and present it to the jury in the summing up and charge, we think it very clear that the court should not show to the jury, as was done in this case, its leaning in favor of one of the parties. It was not for the court to say how far the evidence of Rehtin corroborated that of McCorkle, or whether it corroborated him to any extent. When the attention of the court was called to the testimony of Rehtin as corroborative of that of McCorkle, the court remarked, "Yes, corroborated after a fashion," and proceeded to impress upon the jury that they were to take his testimony "with much allowance and great caution." We think in this that the learned judge invaded the province of the jury, and in all probability controlled their action on this point to the injury of the defendants. *Shank v. The State*, 25 Ind. 207.

There are some other parts of the somewhat singular charge given by the court to the jury in the case, which might be very fairly criticised, but we need not present them, as the judgment must, for the reason already given, be reversed.

The judgment is reversed, with costs, and the cause remanded, with instructions to grant a new trial.

A. Iglehart and J. E. Iglehart, for appellants.

New et al. v. Wambach et al.

NEW ET AL. v. WAMBACH ET AL.

CONTRACT.—*Fraud.—Pleading.*—Complaint to reform a contract and enforce it, alleging that the defendant undertook to reduce a contract between the plaintiff and the defendant to writing; that he fraudulently wrote it differently from the contract really made; that he read it as really made; and that it was signed by the plaintiff, believing its terms to be as it had been agreed they should be. *Held*, that this was sufficient on demurrer.

SAME.—*Mistake.*—A paragraph of complaint for the same purpose, alleging that the defendant wrote the contract, and, by mistake, it was written differently from what it was agreed it should be, was held good on demurrer.

PLEADING.—*Practice.—Departure.—Joint Contractors.*—In a suit upon a joint contract, if an answer shows that the plaintiff has discharged one of the joint contractors, and the plaintiff replies that it was agreed by the defendants at the time of the discharge, that it should not operate as a release of the other defendant, though such reply may be a departure, it is waived if no objection be taken on that account, and the parties proceed to trial upon the issues thus joined; and the defendant who was not released cannot, after trial and verdict, object that no verdict has been rendered as to the defendant admitted by the reply to have been released.

SAME.—*Departure.*—In case of a departure, if, instead of demurring, the defendant takes issue upon the reply, and the issue be found against him, the court will not arrest the judgment because of the departure.

APPEAL from the Marion Common Pleas.

OSBORN, C. J.—The appellees instituted their action against the appellants, for the purpose of reforming a contract, and for the recovery of one thousand dollars.

The complaint contains two paragraphs; they both set up the same contract, alleging that one of the appellees was a foreigner with a very limited knowledge of our language, that the other was an ignorant and illiterate man, and unable to read or write; that New, one of the appellants, wrote the contract and read it as agreed upon by the parties; that they executed it, or caused it to be executed, under the belief that it was written as agreed upon; that they relied upon New, and believed that he had drawn the contract according to agreement; that they have learned that the contract, as executed, was not as made between the parties, and the complaint states specifically wherein it differs from the true one. By the contract the appellants were to pay

the appellees one thousand dollars, upon terms stated. Both paragraphs state that Love, one of the appellants, paid the appellees five hundred dollars; that New, the other appellant, availing himself of the false or mistaken writing himself had made, refused to pay to the appellees five hundred, "being his portion, as aforesaid, of said one thousand dollars."

Prayer, that the contract might be reformed, and for judgment for said five hundred dollars, and five hundred dollars damages, and proper relief.

The appellant New filed a demurrer to the complaint, on the ground that it did not contain facts sufficient to constitute a cause of action, which was overruled. The appellants filed a joint answer of six paragraphs, one of which was a general denial. It will only be necessary to notice the sixth. That alleges that the contract sued on was joint, and not joint and several; that before the commencement of the action, Love paid to the appellees the sum of five hundred dollars, which sum was, by the appellees, accepted and received in full discharge and satisfaction of all liability of Love, for or on account of the contract; that the appellees, in consideration of that sum, so paid by Love, fully discharged him from all obligation or liability in the premises; that by reason thereof both of the appellants were discharged.

To that paragraph, the appellees filed a demurrer, which was overruled. They then filed a reply of two paragraphs, one of general denial, and one admitting the payment of the five hundred dollars by Love, in full for his half of the one thousand dollars, which the appellants had agreed to pay; that it was further true, that the appellees executed a receipt to Love for five hundred dollars, in full discharge of his half of said liability in the contract; they also aver that the appellant New was present at the time of the payment, and it was expressly agreed that such payment should not release him from the remaining five hundred dollars; that he then and there, after the appellees had signed the receipt for the sum paid by Love, expressly agreed to pay the remaining

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five hundred dollars on the following day; and in it they demand judgment, etc. To this reply no demurrer was filed or motion made to strike it out.

The cause was tried by a jury, and a verdict rendered for the appellees against the appellant New for \$558.25.

The jury also answered certain interrogations, submitted to them on motion of the appellants.

The appellants moved the court for a *venire de novo*, which was overruled. They then moved for judgment in their favor on the answer to the interrogatories. That motion was overruled. A motion for a new trial was also overruled, and final judgment rendered against New on the general verdict. Proper exceptions were taken to the rulings of the court. Judgment was rendered in favor of Love, and for his costs against the appellees.

After the cause was appealed, Love filed a written disclaimer of all interest in the appeal and prayed that as to him the appeal might be dismissed. Sec. 551, 2 G. & H. 270.

The first error assigned is, in overruling the demurrer to the complaint. The objection urged to the complaint is, that one who signs a contract is rightly charged with notice of its contents, and he may not avail himself of his own negligence or carelessness to profit thereby, or avoid responsibility incurred, and that it does not appear that proper diligence was used, etc. In this case it is averred in the complaint, that reliance was placed in New; that he wrote and read the contract. There is another rule which we think is applicable in this case, that where one places reliance upon another, the one trusted shall not take advantage of such confidence to the prejudice of the other. The averment in one of the paragraphs is, that New fraudulently wrote the contract different from the one really made, and in the other, that the change was made by mistake, and in both, that he read it as made, and that they supposed the contract as read was the same as the one agreed upon. The demurrer was to both paragraphs, and was correctly overruled. No authorities are cited in support of it, and we think none are

necessary to sustain the action of the court below in overruling it.

The next error assigned is in overruling the motion for a *venire de novo*. The ground of this motion is, that the verdict is defective in not finding for or against Love on the issues.

The issue tendered by the replication to the sixth paragraph of the answer was, whether, when Love paid the five hundred dollars in full discharge and satisfaction of all liability on account of the contract sued on, New was present and agreed that such payment should not release him, and whether he promised to pay the remaining five hundred dollars. Perhaps the reply was a departure from the complaint. But no objection was made to it on that ground, at the proper time, and none can be urged now. If the matters alleged in the answer and reply had been set out in the complaint, and New had been the sole defendant, it seems to us that it would have been good, and not demurrable for a defect of parties. No objection was made that the replication was a departure, but the issue tendered, of the separate liability of New, was accepted and submitted to the jury, who found against him. Although the replication was in form against both defendants, it admitted the discharge of Love and tendered an issue of the several liability of New. The statutory denial of the allegations of the reply does not include what is affirmed in the answer. The answer alleged that Love was discharged, and then stated a conclusion of law, that his discharge operated as a discharge of New. The replication admitted that Love was released, and abandoned the action as to him, but alleged the several liability of New. No verdict was necessary for Love, for the reason that by the replication it was admitted that there was no action against him, and for the same reason none could be rendered against him.

We are referred to *Jenkins v. Parkhill*, 25 Ind. 473. The ruling in that case in no manner conflicts with the rulings in this. In that case, the action was on two bonds; the

answer was, the general denial, with an agreement that all matters of defence might be given in evidence. The jury found against both defendants on one of the bonds, and against one of the defendants on the other, and on that was silent as to the other defendant. It was held that if a jury finds but part of the issue, and says nothing as to the rest, the verdict is ill, and a *venire de novo* shall issue. In that case, there was nothing in the pleadings which raised the question of the discharge of one and a several promise of the other. In case of a departure, if, instead of demurring, the defendant takes issue upon the replication, and it be found against him, the court will not arrest the judgment. 1 Chitty Pl. 648.

The next alleged error is in overruling the motion for a new trial.

There were many reasons for a new trial mentioned in the motion. We shall only mention such as are specified in sec. 352, 2 G. & H. 211.

The sixth specification of cases or reasons for which a new trial may be granted is, that the verdict or decision is not sustained by sufficient evidence, or is contrary to law.

The first reason assigned was, that the general verdict was not sustained by sufficient evidence; the second, that the verdict was contrary to law; the fourth, that certain special findings were not sustained by sufficient evidence, nor was either of them. We have examined the evidence, and think the verdict and all the answers to the interrogatories are fully sustained by the evidence. We do not see wherein the verdict is contrary to law.

The third, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, and thirteenth reasons stated in the motion are not causes for a new trial.

The twelfth reason was for error of law occurring at the trial in refusing to give the following instruction: "The contract declared on, in this case, is a joint contract, and not joint and several; the party of the one part being New and Love, and on the other Wambach and Darby. Now, if you

believe, from the evidence, that Love, on the fourth of March, 1870, paid to Wambach and Darby the sum of five hundred dollars, and upon such payment, was, by said Wambach and Darby discharged from all liability on said contract, such discharge of Love would, by operation of law, discharge the defendant New from all liability on said contract, and you should, therefore, find for the defendant."

What we said relative to the motion for a *venire de novo*, will be applicable here, as our reasons for sustaining the action of the court in refusing to give the instructions asked. They entirely overlooked and ignored the issue of the separate liability of New.

The fourth and last error assigned is in overruling their motion for judgment in their favor on the answers of the jury to the interrogatories.

The interrogatories and answers, under which the appellants claim that they were entitled to judgment in their favor, were as follows:

Int. 1st. "Did the defendant William Love, on the 4th of March, 1870, pay the plaintiff five hundred dollars on said contract of Feb. 25th, 1870?"

Answer. "Yes."

Int. 2d. "At the time said Love paid said sum of five hundred dollars, did not the plaintiff accept said sum of five hundred dollars in discharge of all liability of said Love on said contract of Feb. 25th, 1870?"

Answer. "Yes, as to his part of the contract."

Int. 7th. "Was not the contract after it was written, read over once or more as written, in the presence and hearing of the plaintiffs, before they signed the same?"

Answer. "Yes, not containing the true meaning of the contract."

We have already seen that, under the issue, payment by Love, and his discharge from the contract set out in the complaint, did not discharge New from his liability set out in the replication.

That the contract was read to the plaintiff as written, is

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not inconsistent with the fact that it was also read incorrectly and differently from the way it was written. It may have been read both ways, and although it may have been read in the presence and hearing of the appellees as written, the reading may have been in such a manner as not to be understood by them; and yet when read incorrectly, it may have been read so distinctly, as to have been entirely intelligible to them. We cannot say that the special findings are inconsistent with the general verdict. Sec. 337, 2 G. & H. 206. *The Board of Commissioners, etc., v. Kromer*, 8 Ind. 446; *Amidon v. Gaff*, 24 Ind. 128; *Ridgeway v. Dearinger, ante*, p. 157.

The judgment of the said Marion Common Pleas is affirmed, with costs and ten per cent. damages.

J. Hanna and F. Knefler, for appellants.

G. T. Morton, J. W. Gordon, T. M. Browne, and R. N. Lamb, for appellees.

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DAMAGES.—A plaintiff in an action based on a contract can only recover for such sum as may have been due at the time the action was brought; and in an action founded in tort, for such damages as had accrued at the commencement of the action.

PLEADING.—*Defence.*—A defendant cannot set up a defence that did not exist at the commencement of the action.

SAME.—*Supplemental Complaint.*—A supplemental complaint is not a substitute for the original complaint; it is a further complaint and assumes that the original complaint is to stand. It must consist of facts which have arisen since the filing of the original complaint.

SAME.—*Practice.*—*Supplemental Complaint.*—A supplemental complaint may be filed after answer, but whether filed before or after, it must be by motion and leave of court; and it must appear on its face that it is supplemental and relates to matters which have accrued subsequent to the commencement of the action.

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SAME.—Amendment of Complaint.—Matters which occurred prior to the filing of a complaint must be brought into the suit by amendment.

EVIDENCE.—Evidence tending to prove matters that occurred subsequent to the filing of the complaint should be excluded.

CITY.—Obstructing Alley.—If dirt is dug up and removed from an alley in a city, thus rendering the alley impassable and causing injury to adjoining property, and no order or ordinance of the city has authorized the same, and it is not done under a contract with the city, an action by an adjoining property owner will lie, for damages sustained by reason of such removal.

APPEAL from the Cass Common Pleas.

BUSKIRK, J.—This was an action by the appellant against the appellee, to recover damages for removing earth from an alley adjoining the property of appellant. The complaint was in three paragraphs. Omitting surplus and immaterial averments, and an immense amount of useless and disconnected verbiage, it is alleged in each paragraph of the complaint, that the defendant about the month of September, 1868, did cut, excavate, and remove dirt and gravel out of a certain alley running between the premises of the plaintiff and the property of another, and thereby rendering the alley impassable, and preventing ingress and egress to and from the plaintiff's property bordering on said alley, all of which acts were done without the licence or consent of the plaintiff, and to his damage in the sum of twenty-five hundred dollars.

The defendant answered in two paragraphs:

The first was the general denial.

The second admitted the removal of a part of the earth and gravel complained of, but averred that it was done by virtue of a contract with an adjoining property holder, and in pursuance of a city ordinance, and authority from the street committee of the city of Logansport. It was not averred that it was done in pursuance of a contract with the city. There was a reply in denial.

The cause was, by the agreement of the parties, submitted to the court for trial, and resulted in a finding for the defendant.

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The court overruled the plaintiff's motion for a new trial and rendered judgment on the finding.

The only valid assignment of error is based upon the action of the court, in overruling the motion for a new trial, all the others being repetitions of the reasons for a new trial.

The counsel for appellant, in his brief, only relies upon two reasons for a new trial. The first is the exclusion of certain evidence, and is stated as follows in the bill of exceptions: "The said plaintiff, in support of the issues in his behalf, offered to prove by each of said witnesses certain facts, to wit, that earth was removed from said alley by the defendant subsequent to the filing of the original complaint, and prior to the filing of the amended and supplemental complaint; and that objections were made by the defendant, and objections sustained by the court; to which objection, at the time, plaintiff excepted. To the sustaining of said objection and the refusal to admit the same, plaintiff then and there excepted."

It is insisted by counsel for appellant, that the excluded evidence was admissible upon the ground that he had filed a supplemental complaint, which was in the nature of the old plea of *puis darrein continuance*.

The original complaint was filed on the 23d day of October, 1868, and consisted of two paragraphs. On the 27th day of September, 1869, there was filed what was called a supplemental amended complaint, which consisted of three paragraphs. On the 1st day of October, 1869, a demurrer was sustained to the second and third paragraphs, but no ruling was made as to the first. Thereupon the plaintiff filed an amended complaint in three paragraphs. In the first two complaints it was charged that the defendant did, on or about the —— day of September, 1868, dig, excavate, and remove dirt and gravel, etc. In the last complaint there is added, after the figures 1868, the words "and at subsequent and divers days thereafter." These words are claimed to be supplemental, and to entitle the plaintiff to prove and recover

damages which accrued subsequent to the bringing of the action.

It is the general rule that the plaintiff, in an action based on contract, can only recover for such sum as may be due at the time the action is brought; and in an action founded in tort, for such damages as had accrued at the commencement of the action. *Maxwell v. Boyne*, 36 Ind. 120

Nor can a defendant set up a defence that did not exist at the commencement of the action. *Carr v. Ellis*, 37 Ind. 465.

It is, however, provided by section 102, of the code, that, "the court may on motion allow supplemental pleadings, showing facts which occurred after the former pleadings were filed." 2 G. & H. 123.

A supplemental complaint is not, like an amended complaint, a substitute for the original complaint, by which the former complaint is superseded; but it is a further complaint and assumes that the original complaint is to stand. A supplemental complaint must consist of facts which had arisen since the filing of the original complaint. It may be filed after answer; but whether filed before or after answer, it must be filed on motion and by leave of the court, and must show upon its face that it is supplemental and relates to matters which had occurred subsequent to the commencement of the action. Matters which occurred prior to the filing of the original complaint, and not stated therein, should be brought into the suit by amendment. Matters which occurred since the filing of the complaint should be brought in by supplemental complaint. If the defendant has answered the original complaint, he may answer the supplemental complaint, but he cannot make any further answer to the original complaint except by special permission of the court. *Dann v. Baker*, 12 How. Pr. 521; *Van Santvoord Pl.*; *Burke v. Smith*, 15 Ill. 158.

In our opinion, the last complaint cannot be regarded as a supplemental complaint, but was a substitute for the one to which a demurrer was sustained. The demurrer having been

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sustained to the second complaint, it was no longer a paper in the cause, and as it is essential to a supplemental complaint that the original complaint should stand, the last complaint cannot be a supplemental one, because there was no original complaint to which it could be supplemental.

It results that as the plaintiff's right to recover was limited to such damages as had accrued at the commencement of the action, the court committed no error in excluding the offered evidence.

It is next claimed that the court erred in overruling the motion for a new trial, because the finding of the court was not sustained by, but was contrary to, the evidence.

It is abundantly established by the evidence and admitted in the answer, that the defendant dug up and removed the dirt and gravel from the alley adjoining the property of the plaintiff; that the alley was rendered impassable and the property of the plaintiff seriously injured, but there was no evidence to justify these acts. It was not shown that there was an order or ordinance of the city for the improvement of this alley. There was no contract with the city for doing the work. There was no advertisement for proposals to do the work. Nor was it proved, as was alleged in the answer, that the street committee of said city had given the defendant an order to cut down such alley. A copy of an order signed by such street committee was filed with the answer, but it was not introduced in evidence, or if it was, it is not in the bill of exceptions embodying the evidence. One of the street committeemen testified that such committee gave the defendant permission to cut down the alley after a part of it had been cut down, and that the paper was issued to relieve Manly from a suit commenced by Musselman. It is not necessary to decide, and we do not decide, what power the street committee would have to permit or authorize the cutting down of a street or alley, in the absence of an order and contract on the part of the city for doing such work.

Nor was the defendant authorized by his contract with Mrs. Vigus to cut down the alley, for she testified as fol-

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lows: "I told Manly he could do as the city required, nothing more, nothing less."

We are unable to see any legal excuse or justification for the conduct of the defendant. The case comes clearly within the rule laid down in the case of *The City of Delphi v. Evans*, 36 Ind. 90.

It was said in that case, that "there was no order made for making the improvement. There was no advertisement for proposals for doing the work. There was no written contract. It necessarily and unavoidably results that the city cannot be protected from liability on the ground that it was a proceeding under the charter. It was acting in violation of law. It was a trespasser, and is liable for its acts as such." See *McEwen v. Gilker*, 38 Ind. 233; *Moberry v. The City of Jeffersonville*, 38 Ind. 198.

It is very manifest to us that the finding was not justified by the evidence. This is not a case of conflict of evidence, but there is an entire absence of evidence to show any legal excuse or justification for the acts of the defendant, which were clearly proved, and for this the judgment must be reversed.

The pleadings are in a confused and jumbled-up condition. The entire record is terrible bad—we believe the worst of all the bad records that are sent up to this court. The parties should have leave to amend their pleadings.

The judgment is reversed, with costs, and the cause remanded for a new trial.*

D. C. Justice, for appellant.

T. C. Annabal, for appellee.

*Petition for a rehearing overruled.

Edwards v. Miller et al.

EDWARDS *v.* MILLER ET AL.

PRACTICE.—*Assignment of Error.*—*Reasons for New Trial.*—Where on appeal to the Supreme Court the assignment of errors includes only causes for a new trial, and fails to assign as error the overruling of a motion for a new trial, no question is presented.

APPEAL from the Fayette Common Pleas.

PETTIT, J.—The errors assigned in this case are these: “1st. The finding and judgment of the court is contrary to law. 2d. The finding and judgment of the court is contrary to evidence. 3d. The finding and judgment of the court is contrary to law and evidence. 4th. That the evidence in the case shows that the judgments, on which the property of plaintiff in error is proposed to be sold, have been fully paid, and that the appellees James and William Huston, who claim to be the owners of said judgments, are estopped by their acts and declarations to enforce the same or any part thereof, as against the appellant; but the court refused to enjoin the sale of appellant’s said property, for the payment of the same.” These are only causes for a new trial; and as there is no assignment of error on any pleading, or for overruling a motion for a new trial, we cannot consider any question attempted to be raised by the assignment of errors. Leave was asked to amend the assignment of errors, by adding one for overruling the motion for a new trial, but this leave was refused, because, on examination of the bill of exceptions, we found it so defective that we could not consider the evidence as in the record, hence the proposed amendment could not be of any avail to the appellant.

The judgment is affirmed, at the costs of the appellant.

B. F. Claypool, A. M. Sinks, and J. M. Wilson, for appellant.

J. C. McIntosh, W. Morrow, and N. Trusler, for appellees.

Chidester, Adm'r, v. Chidester.

CHIDESTER, ADM'R, v. CHIDESTER.

DECEDENTS ESTATES.—*Claim in Favor of Administrator.*—An administrator is not authorized by the code of 1852 or by subsequent legislation to file a claim in his own favor against the estate which he administers; but section 802, p. 336, 2 G. & H. continues in force sec. 218, p. 526, of the Revised Statutes of 1843, which provides for the filing of such claims in the probate court; and when the court of common pleas became the successor of the probate court, it became the court for the adjudication of such claims.

APPEAL from the Cass Common Pleas.

WORDEN, J.—Peter Chidester was the administrator of the estate of Mary Chidester deceased. He filed a claim against the estate in his own favor, in the usual manner. The heirs of Mary Chidester appeared and filed an answer to the claim, and the cause was submitted to the court for trial, and the court allowed the claim in part. The heirs moved in arrest of judgment, but the motion was overruled and exception was duly taken. The only question in the cause is, whether an administrator can thus file a claim against the estate of which he is administrator, and have it passed upon.

We are not aware of any provision in the code of 1852, or in any subsequent legislation, that authorizes such a course. The statute gives a creditor a priority in the right of administration over a person not a creditor. 2 G. & H. 485. And yet it fails to provide any means of adjusting his claim against the estate. It is a clear case of omission. The code of 1843, R. S. 1843, p. 526, sec. 218, provides, that, "if any debt or demand claimed by the executor or administrator as due to him from the deceased, shall be disputed by any person interested in the estate, the executor or administrator shall file in the probate court a statement of his claim in writing, setting forth distinctly and fully the nature and grounds thereof; and the person disputing the same may allege any matters of defence, which such deceased or his legal representatives might have alleged against the same; and the decision of such claim may be submitted to

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the court, or the same may be tried by a jury, as in other civil actions, and the verdict or decision thereon shall have the same force and effect as in other cases, reserving to either party the right of appeal, or to prosecute his writ of error to any superior court having jurisdiction."

We are of opinion that this section is continued in force by the code of 1852. 2. G. & H. 336, sec. 802. The claim is, of course, to be filed in the court of common pleas, which takes the place of the probate court, and the writ of error is probably abolished. Otherwise the section seems to be entirely applicable to our present system, and supplies an omission in the code of 1852. See *Hubbard v. Hubbard*, 16 Ind. 25; *Lane v. Taylor*, 40 Ind. 495; *Stanford v. Stanford*, *post* p. 485.

The proceedings below were in substantial compliance with the section above quoted, and there is no error in the record.

The judgment below is affirmed, with costs.

S. T. McConnell and *M. Winfield*, for appellant.

THE GREEN RIVER AND BARREN RIVER NAVIGATION CO. v.
MARSHALL.

APPEAL from the Vanderburg Common Pleas.

PETTIT, J.—The transcript in this case is not paged, the lines numbered, nor is there any marginal notes on it as required by rule nineteen of this court; nor has the assignment of errors any names, appellant or appellee, to, in, or connected with it in any manner, as is required by rule first. For the failure to give the names of the parties in the assignment of errors, the appeal must be dismissed.

The appeal is dismissed, at the costs of the appellant.

B. Hynes, for appellant.

A. Dyer, for appellee.

O'NEIL v. CHANDLER.

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| 140 | 613 |

CONTRACT.—*To Defraud Creditors.—As Between the Parties.*—A contract made to hinder or delay creditors is illegal as to creditors only. As between the parties, and as to all others than creditors, it is legal and valid. and can be enforced in all its terms as any other contract.

SUPREME COURT.—*Rule of Court.—Marginal Notes on Transcript.*—A failure to place marginal notes on the transcript, in compliance with rule nineteen of this court, though perhaps a ground for a motion to set aside the submission of the cause, is not a ground for dismissing the appeal.

APPEAL from the Cass Common Pleas.

OSBORN, C. J.—This was an action on a note executed by the appellee to Elizabeth Chandler, and by her endorsed to the appellant, for one thousand four hundred and seventeen dollars and ninety cents.

The only error assigned is in overruling a demurrer to one paragraph of the answer.

The paragraph demurred to states, that prior to the execution of the note, William Chandler became insolvent and incurred large liabilities to different parties, on which judgments had been rendered to the amount of about eighteen thousand dollars; that, wishing to conceal some of his assets from his creditors and keep the same from being levied upon, he placed them in the hands of the appellee and informed his creditors that they belonged to him and were not subject to execution on the judgments; that the defendant took the property and started business in his own name, William managing the business, but claiming to the public that he was acting as clerk for defendant; that three thousand dollars profits accrued from the business, which was used to increase the business; that the note sued on was given to William "for the stock or capital thus invested in said business;" but at the request and direction of William, it was taken in the name of Elizabeth Chandler, wife of William; that she never exercised any control over it, and traded it to the plaintiff for goods, after notice of the facts alleged; that she had nothing whatever to do with the transaction; that

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no part of the consideration of the note came from her, nor was she consulted about the transaction. It is also averred that the whole of the business arrangements between the defendant and William, was in pursuance of a fraudulent combination on the part of William for the purpose of defrauding his creditors, and that the property has always remained in his possession.

The ruling of the court was undoubtedly based upon *Welby v. Armstrong*, 21 Ind. 489. That case was overruled by *Springer v. Drosch*, 32 Ind. 486, which we adhere to. It is decisive of this.

The judgment of the said Cass Common Pleas is reversed, with costs. Cause remanded, with instructions to the court below to sustain the demurrer to the said paragraph of the answer to the complaint, and for further proceedings.

ON PETITION FOR A REHEARING.

OSBORN, C. J.—A petition for a rehearing has been filed in this case on the ground, principally, that a motion to dismiss the appeal should have been sustained. The grounds of the motion were, a failure to comply with the 19th rule of this court requiring marginal notes to be placed on the transcript in their appropriate places indicating the several parts of the pleadings in the cause, etc.

If a motion had been made to set aside the submission, it might have been sustained; but the failure to comply with the rule was no ground for dismissing the appeal. The second ground was because no notice of appeal as required by 2 G. & H. 270, sec. 551, had been given to Elizabeth Chandler, a co-plaintiff of the appellant.

The record does not show that she was a co-plaintiff with the appellant. There are no pleadings showing other parties than the appellant and the appellee. It shows that the court made an order consolidating two cases designated only by their numbers. The order does not in any manner indicate who were the parties in those actions. After the order

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of consolidation, there are entries in which the name of Elizabeth Chandler is associated with the appellant in the title of the cause, and others in which her name is omitted, the appellant appearing as the sole plaintiff. During the trial, the appellee filed a request in writing, that the jury should be required to answer interrogatories, in which he entitled the action as *Patrick O'Neil v. Oscar F. Chandler*. Two separate verdicts were rendered by the jury, one for the appellant, and one for Elizabeth Chandler, not as co-plaintiffs, but as several plaintiffs.

After the verdict, the appellee filed a motion, again entitling the action between the appellant and appellee, recognizing him as the sole plaintiff. There is nothing in the record showing that Elizabeth Chandler was a party, or interested in the matters in issue between the appellant and appellee.

The petition is overruled.

D. H. Chase, F. E. McDonald, F. M. Butler, and E. M. McDonald, for appellant.

S. T. McConnell and M. Winfield, for appellee.

JAKES v. THE STATE.

CRIMINAL LAW.—*Temperance.—Act of 1859.—Sale for Medical Purposes.—*

On the trial of an indictment for selling intoxicating liquor without a license under the act of 1859, the proof was, that the defendant, a druggist, sold a pint of liquor on the statement of the purchaser that it was for medical purposes, and it was so used.

Held, that the defendant should have been acquitted.

APPEAL from the Tippecanoe Criminal Circuit Court.

WORDEN, J.—The appellant was indicted for, and tried and convicted of, selling intoxicating liquor without a license, in violation of the act of 1859. The case comes before us

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on the evidence, from which it appears that the appellant was a druggist, and that as such he sold to one William W. Smith a pint of whiskey, for the sum of fifty cents. The whiskey was bought, as the witness testified, to be used for medical purposes, and was thus used. When called for, the appellant enquired for what purpose it was wanted, and was informed by Smith that it was wanted for medical purposes. Under these circumstances, the conviction cannot be maintained. *Donnell v. The State*, 2 Ind. 658; *Thomasson v. The State*, 15 Ind. 449. A motion which the appellant made for a new trial should have prevailed.

The judgment below is reversed, and the cause remanded.

G. O. Behm, A. O. Behm, and J. R. Curnahan, for appellant.

J. C. Denny, Attorney General, for the State.

RHODES v. PIPER.

SUPREME COURT.—*Rule of Court*.—If rule 19 of the Supreme Court, adopted on the 6th day of March, 1871 (32 Ind.), requiring marginal notes to be placed on the transcript in the appropriate places, be not complied with, the submission of the cause will be set aside.

APPEAL from the Fayette Circuit Court.

OSBORN, C. J.—On the 6th of March, 1871, this court adopted a rule, that the appellant should cause his transcript to be paged, and the lines numbered, and also cause marginal notes to be placed on the transcript in their appropriate places, indicating the several parts of the pleadings in the cause, the exhibits, if any, orders of the court, and the bills of exceptions; also, when the evidence is set out by deposition or otherwise, the names of the witnesses. Rule 19, 32 Ind. 10, preceding the table of cases.

Etter et al. v. Armstrong et al.

It is quite obvious that the purpose of the rule was to enable the court to more readily find any matter or thing sought for in the record. It often happens that we have to make frequent reference to the same thing, and to many things in connection with each other, and the marginal notes are of great service, and save much time and labor.

In this case the transcript is paged and the lines numbered, but the most important requirement of the rule, making the marginal notes, is entirely omitted. The record was filed on the 22d day of October, 1872.

The practice of the court in such cases has been to set aside the submission of the cause, at the costs of the appellant. Perhaps, if the appellant should refuse to comply with the rule, on a proper application and showing by the appellee, the appeal would be dismissed.

The submission is set aside, at the costs of the appellant.

J. C. McIntosh and *B. F. Claypool*, for appellant.

M. E. Forkner, E. H. Bundy, J. M. Wilson, and A. M. Sinks, for appellee.

ETTER ET AL. v. ARMSTRONG ET AL.

APPEAL from the Morgan Common Pleas.

PETTIT, J.—The appellants have not complied with rule 19 of this court, 32 Ind., in making marginal notes on the transcript. It is of great if not absolute necessity that this rule should be complied with, to assist the judges and facilitate business in this court, which is overwhelmed with cases and labor.

The submission is set aside, at the costs of the appellants.

G. M. Overstreet, A. B. Hunter, W. R. Harrison, and W. S. Shirley, for appellants.

C. F. McNutt, S. Claypool, G. W. Grubbs, and F. P. A. Phelps, for appellees.

Deford v. Urbain.

DEFORD v. URBAIN.

SUPREME COURT.—Appellant's Brief.—Rule 14.—On an appeal to the Supreme Court, the only brief filed within sixty days after the submission of the cause was, as to the body thereof, in these words: "Appellant's Brief. We are clearly of the opinion that the judgment of the court below ought to be reversed, and therefore demand that it be done. Respectfully and seriously." *Held*, that this was not a compliance with rule 14, but an evasion thereof; and, on the appellee's motion, the appeal was dismissed.

APPEAL from the Marion Superior Court.

DOWNEY, J.—This cause was submitted on call of the docket, November 27th, 1872. On the 24th day of January, 1873, the appellant filed what is styled a brief, which, omitting the name of the court, of the parties, and of counsel, is as follows:

"APPELLANT'S BRIEF"

"We are clearly of the opinion that the judgment of the court below ought to be reversed, and therefore demand that it be done. Respectfully and seriously."

Rule fourteen of this court provides, that, "where a cause is submitted on call, the appellant shall have sixty days in which to file a brief, and if not filed within the time limited, the clerk shall enter an order dismissing the appeal, unless the appellee shall have filed with the clerk a written request that the cause be passed upon by the court," etc. The brief which we have copied was the only one filed within the sixty days allowed by the rule. While no definite rule can be prescribed as to what a brief shall contain, it is not difficult to come to the conclusion that the paper filed in this case, and above set out, is not entitled to be regarded as such. What a brief should be was indicated by this court in *Parker v. Hastings*, 12 Ind. 654. It is quite clear that the paper filed in the case under consideration was filed simply to evade the rule of court, and to avoid its operation. The appellee insists that the appeal ought for this cause to be dismissed, and such is our opinion. It was proper that the clerk should not have dismissed the appeal under the rule.

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He could not decide as to whether the rule had been complied with in good faith or not. It is useless for the court to prescribe rules, if such an evasion of them as this is to be allowed.

The appeal is dismissed, with costs.

C. H. Test, D. V. Burns, and G. S. Wright, for appellant.

J. L. Mitchell and W. A. Ketcham, for appellee.

BARNHART v. CISSNA ET AL.

SUPREME COURT.—*Appeal of One of Several Defendants.—Notice to Co-Parties.—*

Where there are three defendants to a suit on a promissory note, of whom one is defaulted, and as to another the cause stands continued, and against the third, after an issue and trial, judgment is rendered, and from that judgment he appeals, without serving notice of the appeal on his co-defendants, the appeal is not properly taken.

APPEAL from the Wabash Common Pleas.

BUSKIRK, J.—The appellees sued Murray, Stone, and Barnhart upon a note payable in bank. Stone pleaded his discharge in bankruptcy, and the cause as to him was continued. Murray made default. Barnhart filed an answer, to which a demurrer was sustained, and he refused to answer further. The damages were assessed by the court and judgment accordingly. A motion for a new trial was made by Barnhart, and was overruled, to which an exception was taken. Barnhart alone appeals. No notice was served upon his co-defendants, as is imperatively required by section 551 of the code, 2 G. & H. 270. The case is not properly here. The appeal has not been taken as required by a positive statute. The appeal must be dismissed.

The appeal is dismissed, at the costs of the appellant.

T. T. Weir, G. H. Voss, B. F. Davis, and J. A. Holman, for appellant.

Peacocke v. Mauck et al.

PEACOCKE *v.* MAUCK ET AL.

SUPREME COURT.—*Evidence.*—The rule that the Supreme Court will not reverse a judgment upon the weight of conflicting evidence is perhaps rendered more clearly applicable by the fact that two juries have found upon the issue in the same way.

APPEAL from the Harrison Circuit Court.

DOWNEY, J.—This action was brought by the appellant against the appellees and resulted in a judgment for the defendants. The only question presented by the assignment of errors is as to the correctness of the ruling of the court in refusing to grant a new trial on the motion of the plaintiff. Sarah Mauck, one of the defendants, was the widow of one Joseph Charley, deceased, and the administratrix of his estate. She afterward married John Mauck, her co-defendant, who filed his written consent that she should continue to act as such administratrix. Mrs. Peacocke had been the widow of one Samuel H. Keene, who was an attorney, and as such had collected certain claims due to the estate of Charley, placed in his hands by Mrs. Mauck, the administratrix. One Robert Leffler was executor of the will of Keene, and as such, assisted by one Tracewell, who appears to have acted as attorney of both parties, made a settlement with Mrs. Mauck relating to such collections, and paid her a balance found to be due. After the settlement of both estates, the appellant, who is sole devisee and legatee under the will of Keene, and who was again married to one Peacocke, brought this action, alleging in one paragraph that three of the items allowed and paid by Leffler, as such executor, were improperly paid, and in another setting up a claim for money had and received. Among other paragraphs of the answer, the defendants pleaded a general denial. A trial by jury ended in a verdict for the defendants. A new trial was granted, and upon the second trial there was another verdict for the defendants. A second new trial being refused, final judgment was rendered for the defendants.

The State *v.* Johnson.

Passing over the question which is presented by a cross error assigned, whether Mrs. Peacocke can maintain the action, under the circumstances, we have examined the evidence, to see whether the question of fact was or was not rightly decided against her. The evidence as to the main questions involved was mostly the testimony of Tracewell on the one side and Mrs. Mauck on the other. As to one of the items, a former receipt purporting to have been signed by Mrs. Mauck was found and offered in evidence. She denied the execution of this receipt, and there was little evidence to the contrary. As to the other items, there seemed to be nothing new discovered since the settlement was made. The credibility of the witnesses was fairly involved, with the other circumstances bearing on the question. Ordinarily, this court does not reverse a judgment under these circumstances, and perhaps the fact that two juries have found in the same way upon the questions involved would bring the case more clearly within the rule.

The judgment is affirmed, with costs.*

S. Peacocke, J. E. McDonald, and J. M. Butler, for appellant.

A. Stephens, for appellee.

*Petition for a rehearing overruled.

THE STATE *v.* JOHNSON.

APPEAL from the Grant Common Pleas.

PETTIT, J.—This case, in all legal respects, is the same as *The State v. Saxon*, *post*, p. 484, and must have the same result.

The judgment is affirmed.

J. L. Custer and *J. C. Denny*, Attorney General, for the State.

G. W. Harvey, for appellee.

The State v. Ensey.

THE STATE v. ENSEY.

CRIMINAL LAW.—*Appeal by State.*—*Assignment of Error.*—*Reservation of "Point of Law."*—When the State appeals in a criminal action from the judgment below, and the only question there reserved is upon the overruling of a motion for a new trial, and such ruling is not assigned as error, the appeal is not within section 119 of the criminal code, 2 G. & H. 420. Whether such exception to the overruling of the motion for a new trial constitutes the reservation of a "point of law" was not decided.

APPEAL from the Park Circuit Court.

DOWNEY, J.—The appellee was indicted for giving away intoxicating liquor to a minor. Upon arraignment, the defendant pleaded not guilty, and on a trial of the issue by the court, he was found not guilty. The prosecutor moved for a new trial, because the finding of the court was contrary to law and the evidence. This motion was overruled, and the State excepted, and by bill of exceptions put the evidence in the record. The prosecuting attorney has in this court assigned as errors the following :

1. The court erred in not finding the defendant, Nelson Ensey, guilty, upon the evidence and the law presented to the court in said cause.

2. The court erred in deciding that the eleventh section of the act entitled "an act to regulate and license the sale of spirituous, vinous, malt and other intoxicating liquors," etc., approved March 5th, 1859, 1 G. & H. 617, related only to retailers, and that unless a man is a retail dealer he is not liable for giving liquor to a minor.

There is no appearance or brief for the appellee in this court.

Section 119 of the criminal code, 2 G. & H. 420, reads as follows: "The prosecuting attorney may except to any opinion of the court during the prosecution of any cause, and reserve the point of law for the decision of the Supreme Court. The bill of exceptions must state clearly so much of the record and proceedings as may be necessary for a fair statement of the question reserved. In case of the acquittal of the defendant, the prosecuting attorney may

The State v. Ensey.

take the reserved case to the Supreme Court upon an appeal at any time within one year. The Supreme Court is not authorized to reverse the judgment upon such appeal, but only to pronounce an opinion upon the correctness of the decision of the court below. The opinion of the Supreme Court shall be binding upon the inferior courts, and shall be a uniform rule of decision therein. When the decision of the court below is decided to be erroneous, the appellee must pay the costs of the appeal."

We are of the opinion that this record is not so made up as to justify us in deciding anything upon it under this section of the code, in pursuance of which it was sought to bring the case before us.

No question seems to have been reserved in the court below, except upon the refusal of the court to grant a new trial on the motion of the prosecuting attorney. This ruling of the court, as will be seen, is not assigned as error in this court. We do not decide, and need not decide in this case, whether such an exception constitutes the reservation of a "point of law," within the section of the statute quoted, or not. We think that the ruling of the court upon the question reserved must be assigned as error.

There is no foundation in the record for the second assignment of error. That question was not reserved in the court below. It is only the question on which the court below has given an opinion, and to which opinion the prosecutor has excepted, which can be reviewed by this court, and the ruling of the court on that question must be assigned for error in this court.

The appeal is dismissed.

J. C. Briggs and *J. C. Denny*, Attorney General, for the State.

S. F. Maxwell and *S. D. Puett*, for appellee.

Lehritter v. The State.

LEHRITTER v. THE STATE.

TEMPERANCE LAW OF 1859, 1873.—*License.—Penalties.*—Section 21 of the Temperance law of 1873 intends that persons who held a license under the law of 1859 should have a right to sell until such license expired, as if they had had a permit under the new law for such time, and that they should be subject to the penalties of the new law for any violation of its provisions.

SAME.—*Sale on Sunday.—License.—Evidence.*—On the trial of an indictment for selling liquor on Sunday, May 11th, 1873, the proof of a license under the act of 1859 was immaterial.

APPEAL from the Marion Criminal Court.

DOWNEY, J.—This is an indictment against the appellant, charging, in substance, that he did, on Sunday, the 11th day of May, 1873, at, etc., sell two gills of intoxicating liquor to Peter Goth, for ten cents, and suffer and permit the same to be drank in the building and upon the premises where sold. There was a motion to quash the indictment made and overruled, to which ruling the defendant excepted. Upon plea of not guilty, and a trial by the court, the defendant was found guilty. He moved for a new trial and in arrest of judgment, both of which motions were overruled, and he again excepted. There was final judgment against the defendant, from which he appealed, and has here assigned said rulings as errors.

The indictment does not differ from that in the case of *Lehritter v. The State*, ante, p. 383, in any essential particular, and under the ruling in that case, must be held sufficient.

On the trial of the cause, the defendant, according to a statement in the bill of exceptions, after the State had closed its evidence, gave in evidence "the license from the county of Marion, and State of Indiana, to sell intoxicating liquors in less quantity than a quart, in said county, dated January, 1873, running one year, the fact of which license was admitted by the State." The license is not set out in the bill of exceptions. We are of the opinion that the fact that the defendant held a license granted under the act of 1859 was entirely imma-

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terial. It is provided in the twenty-first section of the act of 1873, that the law shall be in force from and after its passage, except in so far as relates to those who hold a license under the existing laws of the State, and that it shall apply to them after the expiration of such license. We think it was the intention of the legislature that such persons as held a license under the law of 1859 should have a right to sell until the expiration of the license, as if they had had a permit under the new law for such time, and that they should be subject to the penalties of the new law for any violation of its provisions. The license did not authorize a sale on Sunday.

The judgment is affirmed, with costs.

B. F. Brown and *W. P. Adkinson*, for appellant.

R. P. Parker, H. Lee, J. B. Elam, and J. C. Denny, Attorney General, for the State.

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RECORD.—*Evidence*.—Where, on appeal in a criminal action, the evidence is not in the record, the Supreme Court cannot determine that it did not sustain the decision of the court.

APPEAL from the Marion Criminal Circuit Court.

PETTIT, J.—The indictment in this case is, in all legal aspects, the same as in the case of *Lehritter v. The State, ante*, p. 383; and on the authority of that, we hold that the indictment in this case is good, and that there was no error in overruling the motion to quash.

A motion in arrest of judgment was also properly overruled, because the indictment was good, and there is nothing appearing in the record for which the judgment ought to have been arrested. There was a motion for a new trial for the reasons:

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“ 1. That the decision of the court is not sustained by the evidence.

“ 2. That the decision of the court is contrary to law.”

The evidence is not in the record, and we are, therefore, not able to see that it did not sustain the finding; nor are we able to see that the decision was contrary to law.

The judgment is affirmed, at the costs of the appellant.

B. F. Brown and *W. P. Adkinson*, for appellant.

J. C. Denny, Attorney General, for the State.

THE STATE *v.* SAXON.

COSTS.—Bill of Exceptions.—To present to the Supreme Court any question arising upon a motion to tax costs, a bill of exceptions must have been filed.

APPEAL from the Grant Common Pleas.

PETTIT, J.—There is no question in this case properly presented by the transcript for our consideration. The only one attempted to be raised or presented is as to the taxation of costs. The entry of the clerk shows that a motion was made for that purpose and ruled upon by the court. Time was given to file a bill of exceptions, but none was filed, which was essential to present the question of the proper or improper action of the court below on the motion to this court. *Urton v. Luckey*, 17 Ind. 213; *Snowley v. Stark*, 16 Ind. 371; *Conner v. Winton*, 10 Ind. 25.

The judgment is affirmed.*

J. L. Custer and *J. C. Denny*, Attorney General, for the State.

G. W. Harvey, for appellee.

*Petition for a rehearing overruled.

STANFORD ET AL. v. STANFORD ET AL.

DECEDENTS' ESTATES.—*Claim.—Jurisdiction.*—To confer jurisdiction over the subject of the action, a claim against the estate of a decedent must be filed, placed upon the appearance docket, and, if not allowed, must be transferred to the issue docket; and, upon demurrer for want of jurisdiction, the record must show that such steps have been taken.

SAME.—*Other Defendants.*—Where another person is a necessary defendant with the administrator or executor, the claim need not be filed against the estate, but an ordinary action may be brought against the administrator and such other person.

SAME.—*Parties.*—To an ordinary claim against an estate, neither the heirs nor the guardians of the heirs are necessary parties defendants.

SAME.—The same person cannot act in the double capacity of plaintiff, urging his own claim against an estate, and of defendant, making a defence to the same. In such case the court should appoint some person to defend for the estate.

APPEAL from the Henry Common Pleas.

BUSKIRK, J.—The assignment of errors presents several questions for our decision, but as one of them calls in question the jurisdiction of the court below, we will first consider and decide that question; for if it should be found that the court below did not possess jurisdiction, the other questions need not be considered, as all the proceedings would be void.

The action was commenced in the Delaware Common Pleas, by Thomas Stanford, sole plaintiff, against Arnett Stanford, administrator of the estate of Thomas R. Stanford, deceased. The action was commenced by an ordinary complaint, upon the filing of which the defendant entered his appearance and filed a demurrer, but upon what ground we are not advised, as the demurrer is not in the record. At the same time, Miles Marshall, guardian of Lee and Ellen Stanford, minor children of the said Thomas R. Stanford, deceased, by his second wife, was admitted a defendant. The venue was then changed, by agreement, to the Henry Common Pleas.

In the Henry Common Pleas, the complaint was amended by making eight other persons, children of the said decedent by his first marriage, co-plaintiffs with the original

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plaintiff, at which time the complaint was sworn to by the original plaintiff.

Separate demurrers were filed by the administrator and the guardian. The grounds of the demurrer by the administrator were as follows :

“ 1. That the complaint does not state facts sufficient to constitute a cause for action.

“ 2. That the court has no jurisdiction of the subject of the action or of the parties defendants, in this, to wit : no such claim has been filed against said estate for allowance by said administrator in the manner required by law, nor entered on the appearance docket of the common pleas court of the county where the said administrator was appointed, for allowance or rejection by him, and thence transferred to the issue docket of said court for trial as required by law.”

The demurrer of the guardian was for the same causes.

Both demurrers were overruled, and an exception taken.

The action was based upon the following instrument :

“ May 20th, 1849. Received of Thomas Arnett, executor of Thomas Arnett, deceased, eight hundred and sixty-two dollars of my wife Mary's estate, to be accounted for in the settlement of my estate to her heirs at ten per cent. per annum
T. R. STANFORD.”

The complaint alleges that Mary Stanford was the lawful wife of the decedent on the 20th of May, 1849; that at such time she was the owner in her own right of the above named sum of money; that said sum was received by the decedent, upon the agreement and conditions therein named; that the said Mary had departed this life intestate, leaving children, whose names are given, her surviving; that by the word heirs as used in said receipt was meant the heirs of her body; that subsequent to the death of the said Mary the said Thomas R. had married again, by which marriage he had two children, Lee and Ellen, born to him; that the said Thomas R. had departed this life intestate, without making any provision for the payment of said money with interest thereon; that Thomas Stanford, a son of the

decedent by the first marriage, had been appointed administrator, and that he had refused to pay the same.

The prayer of the complaint was for judgment against the administrator of said estate, and for other proper relief.

Two positions are assumed by counsel for appellees:

1. That it need not affirmatively appear upon the face of the record that the claim was filed against the estate, that it was entered upon the appearance docket, and was transferred to the issue docket for trial.

2. That the want of jurisdiction over the subject of the action or the person of the defendant can not be raised by demurrer.

On the other hand, counsel for appellants insist that the court below acquired no jurisdiction over the subject of the action or the person of the defendants; unless the claim was filed against the estate as required by law, and that such want of jurisdiction may be shown by demurrer.

It is provided by section 62 of the act for settlement of decedents' estates, that a succinct statement of the nature and amount of any claim of the character of this must be filed, etc.

By sec. 65, it is made the duty of the clerk to make out a list of all claims filed against any estate, and at the next term of such court to present the same to the executor, etc., when further proceedings shall be continued to the ensuing term of said court.

By sec. 66, it is provided, that such claim shall be placed upon the appearance docket, and if not allowed shall be transferred to the issue docket and shall stand for trial at the next term as other civil actions.

It is also provided in sec. 62, that no other court shall have original jurisdiction of such claim.

We think it quite clear from the above sections of the statutes and the various decisions of this court, that to confer jurisdiction over the subject of the action, a claim against an estate of a decedent must be filed, placed upon the appearance docket, and, if not allowed, must be trans-

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ferred to the issue docket, and that upon an appeal to this court the record must show that such steps were taken. The statute does not prescribe the form of the statement. It may be by a regular complaint; but whatever form is adopted it must be filed as above indicated. *Morgan v. Squier*, 8 Ind. 511; *Crabb v. Atwood*, 10 Ind. 322; *Gifford v. Black*, 22 Ind. 444; *Braxton v. The State*, 25 Ind. 82; *Martin v. Asher's Adm'r*, 25 Ind. 237; *Pulley v. Perfect*, 30 Ind. 379; *Hyatt v. Mavity*, 34 Ind. 415; *Ratcliff v. Leunig*, 30 Ind. 289.

The above rule does not apply where another person is a necessary defendant with the administrator or executor. In such case the claim need not be filed against the estate, but an ordinary action may be brought against the administrator and such other person. *Braxton v. The State*, 25 Ind. 82.

It, therefore, becomes necessary to inquire whether the guardian of Lee and Ellen Stanford was either a necessary or proper party.

We are of opinion that he was not either a necessary or proper co-defendant with the administrator. Sec. 68, 2 G. & H. 504, makes it the duty of an executor or administrator to attend and make all necessary defences against all claims that stand for trial, and for failure to do so he is made liable upon his bond. If the administrator, in the present case, was in a condition to make an efficient and honest defence, there was no necessity for any other defendant. No judgment was demanded against the guardian, and none could have been rendered against him or his wards upon the allegations of the complaint. There was no attempt to bring the case within section 178, 2 G. & H. 534. That section provides, that "the heirs, devisees and distributees of a decedent, shall be liable to the extent of the property received by them from such decedent's estate, to any creditor whose claim remains unpaid, who, six months prior to such final settlement, was insane, an infant, or out of the State; but such suit must be brought within one year after the disability is removed."

It was said by this court in *Ratcliff v. Leunig*, *supra*, that

the above was the only statutory provision making the heirs, devisees, and distributees of a decedent liable, on account of the estate received by them, for the debts of the decedent. Neither the guardian nor his wards were necessary or proper parties, under the above section, for there was no personal liability against such heirs.

It, however, appears from the record, that the administrator was the son of the decedent by his first wife, and that he was made a co-plaintiff. He could not act in the double and inconsistent capacity of plaintiff, urging his own claim, and defendant, making an efficient and honest defence. There could not be a trial without an adversary party. The court should have appointed some person to make a defence for the estate. *Hubbard v. Hubbard*, 16 Ind. 25.

It remains to inquire whether the question of jurisdiction was raised by the demurrer. There has been some conflict in the decisions of this court upon this question, but since the decision in *Loeb v. Mathis*, 37 Ind. 306, it should no longer be regarded as an open question. That case was decided by the late judges of this court, and both opinions evince great learning and research. The petition for a rehearing was overruled by the present members of this court, after an exhaustive argument, and upon full consideration.

We think the question of jurisdiction was raised by the demurrer, and that the court below possessed no jurisdiction of the subject-matter of the action.

It necessarily results that all the orders and judgment were void.

The judgment is reversed, with costs; and the cause is remanded, for further proceedings in accordance with this opinion.*

W. Brotherton and C. E. Shipley, for appellants.

W. March, M. E. Forkner, E. H. Bundy, and T. J. Sample, for appellees.

*Petition for a rehearing overruled.

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TURBEVILLE v. THE STATE.

CRIMINAL LAW.—Venue.—Judicial Knowledge.—Presumption.—Where the proof under an indictment for grand larceny was, that the goods were stolen at Plainfield, Hendricks county, and brought into Marion county, this court took judicial notice that Plainfield is in Hendricks county, Indiana, and presumed that the county intended by the witness was Hendricks county in this State.

EVIDENCE.—Statements.—Immaterial.—On the trial of an indictment, evidence of statements made in the absence of the defendant, by one not connected with the defendant by the evidence, is inadmissible, but where the evidence is harmless, or favorable to the defendant, a judgment against him will not be reversed on account of the admission of such evidence.

LARCENY.—Finding Stolen Goods.—Joint Possession of Place.—Evidence.—Where the only evidence connecting the defendant with the larceny was the finding of part of the recently stolen goods in a room jointly occupied by him and another person, and more particularly under the control of the latter, who was not charged with the larceny, the evidence was not sufficient to justify a conviction.

APPEAL from the Marion Criminal Court.

BUSKIRK, J.—The appellant was indicted, tried, found guilty of grand larceny, and, over his motion for a new trial, was sentenced to the state prison.

The error assigned is the overruling the motion for a new trial.

The first reason assigned for a new trial is, that it does not appear from the evidence that the court below had jurisdiction of the offence. The indictment charged that the crime was committed in Marion county, Indiana. It was proved upon the trial that the property was stolen in Plainfield, in Hendricks county, and was brought into Marion county, where it was found. To make out the offence, in such a case, it is necessary that it should be proved that the property was stolen in one county in this State, and transferred to another county in this State. If property is stolen in another state and is brought into this State, the thief cannot, under our laws, be punished in this State. *Beal v. The State*, 15 Ind. 378, and the authorities there cited.

The point made and argued by the counsel for appellant

is, that it was not proved on the trial that the Hendricks county, where the property was stolen, was in the State of Indiana, and that this court can not know judicially that such county was in this State.

The location and boundaries of Hendricks county are fixed by a public statute of this State. 1 G. & H. 165.

The courts of this State must take judicial notice of what is, and what is not, the public statutory law of the State. *Evans v. Browne*, 30 Ind. 514.

The Supreme Court will take judicial notice of a county created by a public statute, but not of one created by county commissioners, under the general law. *Buckinghouse v. Gregg*, 19 Ind. 401.

The courts will take judicial notice of the geography of the country, and the mode of subdividing congressional townships into sections. *Mossman v. Forrest*, 27 Ind. 233.

In *Whitney v. The State*, 35 Ind. 503, where it was testified, that the crime was committed "in Indianapolis, in this county," it was held, that we would take judicial notice that the crime was committed in Marion county, Indiana.

In the recent case of *Cluck v. The State*, 40 Ind. 263, it was held that we would take judicial notice that Indianapolis was in the county of Marion, and State of Indiana.

There seems to be no room to doubt that we are required to take judicial notice that the town of Plainfield is in Hendricks county, and that such county is in the State of Indiana, and that the presumption will be indulged that the Hendricks county spoken of by the witnesses was Hendricks county, Indiana.

It is in the next place insisted that the court erred in admitting illegal and incompetent evidence on the trial, over the objection and exception of the appellant. John Lyons, a witness called by the State, testified that on the day after the larceny was committed, some person came to his loan office in the city of Indianapolis, and pawned to him a carpet bag and some dress goods, which were afterward claimed by Tomlinson and Ellis, and shown to have been stolen from their store in Plainfield, Hendricks county;

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that the person who pawned him the goods was a stranger to him, and that the appellant was not present. The prosecuting attorney then asked such witness the following questions:

“Describe the appearance of the man who brought those pieces of dress goods to your loan office, what he said as to where he got the goods, where he was from, what he did, what he wanted, and all that he said in reference to those goods; and what you did, if anything.”

This evidence was objected to by the appellant on the grounds that he was not present, that there was no evidence that such man was his agent, or that he had any knowledge of the transaction, or was responsible for what such man said; but the objection was overruled by the court, and appellant excepted.

The witness then testified as follows: “The man who brought the goods I have referred to, to my office, was a tall man, dark complected, dark hair and whiskers, well dressed. I never saw him before or since. He said he was a peddler; that he came from the east and brought the goods with him to this city; that he was out of money and wanted me to advance him twenty dollars on the dress goods, the same goods afterwards given up by me to Tomlinson and Ellis. I kept the goods until the next Wednesday. On the next day, on the sidewalk, near my office, I saw the defendant talking to some person who was not the man who brought the dress goods to me. The defendant was never in my office. I never spoke to him or had any business with him.”

It was competent for such witness to give a description of the person who sold him the goods, for the purpose of connecting the defendant with the transaction, and it would have been competent for the defendant to have called out such description, for the purpose of showing that he was not the person who had sold or pawned the goods. But what was said by such person, in the absence of the defendant, was mere hearsay evidence, and was incompetent and inadmissible. The court erred in admitting such evidence, but

we can not reverse the judgment for such error, for the reason that it was a harmless error, so far as the appellant is concerned. The evidence did not injure him, but was much in his favor. His counsel in the discussion of another branch of the case refers to the evidence as strongly tending to show the innocence of the appellant of the crime with which he is charged.

As to the admissibility of this evidence, the following authorities are referred to: 1 Greenl. Ev., Secs. 110, 111; Wharton Crim. Law, Secs. 702, 704; 1 Phillipps Ev. 188, note 81.

It is next claimed that the court erred in the exclusion of competent evidence offered by the appellant.

The question arises in this manner: Mrs. Wise, who was a sister-in-law of the appellant, testified, that she went to the house occupied by the appellant, on the afternoon of the day preceding the evening that the search was made of the rooms occupied by appellant; that a man by the name of Reed and his wife, or a woman whom he called his wife, occupied the south room and boarded with the appellant; that the carpet bag and a dress pattern were found that night under a lounge in the room occupied by Reed; that she heard Reed in the afternoon ask his wife what kind of a dress pattern she wanted. The appellant then asked this witness to state what response was made by Mrs. Reed to the question propounded to her by her husband.

The ruling of the court in excluding the evidence was so manifestly right, that we would not be justified in referring to authority in support of it.

Finally, it is urged that the verdict of the jury was not supported by, but was contrary to, the evidence.

The material facts as established by the evidence are these:

The store of Tomlinson & Ellis, at Plainfield, Hendricks county, was broken open, and two carpet bags and several pieces of dress goods were stolen, on Thursday night, the 31st day of October, 1872. On Friday, the first day of

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November, 1872, a stranger, as has already been shown, pawned all the stolen goods, except one carpet bag and one dress pattern, with a pawnbroker, on Illinois street, in the city of Indianapolis, Indiana. On Monday, after the larceny, Ellis came to Indianapolis and gave information to the chief of police of the larceny. On that night the rooms occupied by the appellant were searched, and a carpet bag and one dress pattern were found. On the Wednesday following, the residue of the stolen property was found at the loan office on Illinois street, and was given up. There was no positive evidence as to who committed the robbery, nor was there any evidence which, in the slightest degree, connected the appellant with the stranger who pawned the goods at the loan office. The only evidence in the record, which, in any manner, tends to show the guilt of the appellant was the finding of a part of the stolen property in the rooms rented and occupied by him, and his failure to satisfactorily account for their presence in his rooms. The appellant had rented two rooms on West Washington street. The front room faced the north, and the back room was directly south of the front room. A door opened from one room to the other. The front room was occupied by the appellant and his wife. The back room was occupied by a man by the name of Reed and a woman that was called his wife, who took their meals with the appellant. All the furniture in the two rooms, except the bed in the back room, which they slept on, owned by Reed, belonged to the appellant. There was a lounge in the back room, which stood just inside the door, and was slept on, on the night of the search, by the appellant's sister-in-law, who was visiting him. Reed moved out of the south room only a few hours before the search was made. His wife remained about a week and then left. The goods were found under the lounge, in the south room. Reed was not at the rooms after the search, but his wife met him elsewhere. The appellant returned home shortly after the search, and was informed by his sister-in-law, Mrs. Wise, that his rooms had been searched, and a carpet bag and dress

pattern had been found under the lounge. Mrs. Wise asked him what it meant. He said he was going to hunt Reed and see. He left and was not in his rooms again. Some days afterward, he was arrested, while standing on the platform at Southport, some five miles south-east of Indianapolis.

We are required to decide whether the finding of the stolen property, at the place, and under the circumstances stated, was sufficient to require him to account for their presence, and on his failure so to do, to raise the presumption that he was the thief.

It is well settled by elementary writers on criminal law and many adjudged cases, that the possession of stolen property, to be sufficient to put a party in whose possession it was found upon his defense, the possession must be both recent and exclusive. In the case under consideration, the possession was recent. Was it exclusive? Burrill on Circumstantial Evidence states the law as follows: "The possession must be exclusive. A finding of stolen property in the prisoner's house or apartment, is equally competent in evidence against him, as a finding upon his person. But the house or room must be proved to be in his exclusive occupation. If the property were found in a locked-up room or box of which he kept the key, it would be a fair ground for calling upon him for his defence. But if it were only found lying in a house or room in which he lived jointly with others, equally capable of having committed the theft, it is clear that no definite presumption of his guilt could be made." See, to the same effect, Best Pres., sec. 229; 1 Phillipps Ev. 540; 3 Phillipps Ev. 480, Cowen & Hill's Notes; 2 Starkie Ev. 840; Roscoe Criminal Ev. 19; *Davis v. The People*, 1 Parker C. C. 447.

The evidence having shown that the possession was not exclusively in the appellant, no presumption could be indulged against him, nor was he required to satisfactorily account for the presence of the goods in the place where they were found.

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The appellant was convicted upon circumstantial evidence only. The only circumstance against him was the possession of the stolen property, which, at 'best, only raised a *prima facie* presumption of his guilt. This is not sufficient to justify a conviction. The rule is stated to be: "It is not sufficient that the circumstances proved coincide with, account for, and therefore render probable the hypothesis sought to be established; but they must exclude, to a moral certainty, every other hypothesis, but that single one." Burrell Circumstantial Ev. 181. See, also, 1 Starkie Ev. 482; Best Pres., sec. 210; Wills Circumstantial Ev. 149; 1 Philipps Ev. 438; 1 Greenleaf Ev., sec. 13 a.

The circumstances surrounding the finding of the carpet bag and dress pattern in the room occupied by appellant and Reed more strongly tend to show the guilt of the latter than the former, for the articles were found in the room which was more in the control of Reed than the appellant. The possession of the rooms was joint. The finding of the stolen property in such rooms, so occupied, could not raise the presumption of a separate and exclusive possession of either of the occupants. The prosecuting attorney, in his very able brief, admits that the circumstances under which the carpet sack and dress pattern were found were not sufficient to show a separate and exclusive possession in the appellant. But he insists that the possession was jointly in the appellant and Reed, and then proceeds to state certain portions of the evidence which showed that a very intimate relation existed between the two; and from the joint possession of the stolen property and these facts he argues that the larceny was committed jointly by appellant and Reed; but without deciding what would be the effect of a joint possession of the stolen property by persons jointly indicted, the joint possession of the stolen property in question can have no application to the present case; for the record does not even show that Reed was accused, let alone having been indicted and convicted of the larceny.

We are very clearly of the opinion that the verdict of the

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jury was not supported by the evidence, and that the court erred in overruling the motion for a new trial, for which error the judgment must be reversed.

The judgment is reversed; and the clerk is directed to immediately certify this opinion to the court below, and to issue his order to the warden of the northern prison for the return of the prisoner to the Marion county jail, for a new trial in accordance with this opinion.

W. W. Leathers, for appellant.

R. P. Parker, H. Lee, J. B. Elam, and *J. C. Denny*, Attorney General, for the State.

PRICE ET AL. v. POLLOCK ET AL.

APPEAL from the Wayne Common Pleas.

PETTIT, J.—This suit was brought by the appellees against the appellants. There were twenty-three defendants below. All but one stayed in the case to its end. There was a finding and judgment affecting the rights of all, including the one who was not in court, if his interest could be affected by such finding and judgment. Nineteen of the defendants only have appealed and assigned errors, and have not given their co-defendants notice of the appeal, as is required by sec. 551, 2 G. & H. 270; and for this failure the appeal is dismissed, at appellants' costs.

J. P. Siddall, for appellants.

L. D. Stubbs, for appellees.

The Shelbyville and Rushville Turnpike Co. v. Barnes.

THE SHELBYVILLE AND RUSHVILLE TURNPIKE CO. v. BARNES.

TURNPIKE.—*Consolidation.*—The act of February 23d, 1859 (1 G. & H. 490, relating to the consolidation of turnpike companies, only authorizes the consolidation of companies theretofore organized. There is no authority by which companies since organized can be consolidated.

SAME.—*Release of Stockholder.*—The consolidation of turnpike companies without the consent of the stockholders, even when authorized by statute, discharges the stockholders not consenting from the payment of subscriptions. The fact that the consolidated company bears the same name as the original company to which the subscription was made will not change this rule.

APPEAL from the Shelby Common Pleas.

DOWNEY, J.—Suit by the appellant against the appellee, and judgment on demurrer to the complaint for the defendant. The complaint was in two paragraphs, and the demurrers were for the reason that the paragraphs of the complaint did not state facts sufficient to constitute a cause of action. The sustaining of the demurrer is the error assigned. The paragraphs of the complaint need not be separately examined, as they are each liable to the objection urged, if it is a valid one. The first states that a turnpike company was organized, by the name of The Shelbyville and Little Blue River Turnpike Company, on the — day of March, 1869, under the act of May 12th, 1852, and that the defendant subscribed to the capital stock thereof on the articles of association two hundred dollars, payable in such proportions as the board of directors might order. It also alleges the organization of another turnpike company by the name of The Shelbyville and Rushville Turnpike Company, under the same act, on the — day of February, 1869, and that the defendant subscribed to the capital stock of said last named company on its articles of association, the sum of two hundred dollars, payable in like manner as the former. It is then alleged that each of the companies by its board of directors legally elected and acting as such, on the 7th day of September, 1870, did by mutual written agreement and articles of association, entered into and executed by each of

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said companies, intersect, join, and unite the said gravel roads and line of route for the gravel road described above in the articles of association of each of said turnpike companies, neither of said roads at that time being completed, and both of them being in progress of construction; and did by said written agreement and articles of association then and there merge and consolidate the stock of said turnpike companies, making thereof one joint stock company of the two roads upon the terms agreed upon, as set forth in said written agreement, etc., so that the two companies form but one company which is known as The Shelbyville and Rushville Turnpike Company, etc. The directors of the consolidated company were, by the agreement, to consist of six persons, these to be selected by the board of directors of each company, from their own number. It is further stated that the board of directors of the consolidated company was selected accordingly, and that they fixed the amounts and time of the payments to be made by the defendant of the stock so subscribed by him, etc.; that they gave notice of the calls, and tendered him certificates of stock before suit brought, etc.; wherefore, etc.

The only statute to which our attention has been called relating to the subject of consolidating such companies is that of February 23d, 1859, 1 G. & H. 490. This act only authorizes the consolidation of companies theretofore organized, and cannot apply to the companies attempting to consolidate in this case, which were organized, as we have seen, in 1869. We are not aware of any authority by which such consolidation can be sustained where there is no statute authorizing it, and counsel for appellant has cited none. It has been several times decided by this court that a consolidation, without the consent of the stockholder, even when authorized by statute, furnishes a cause for the discharge of the stockholders not consenting. *Carlisle v. The Terre Haute, etc., Railroad Co.*, 6 Ind. 316; *Fisher v. The Evansville, etc., Railroad Co.*, 7 Ind. 407; and *McCray v. The Junction Railroad Co.*, 9 Ind. 358.

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It is suggested, however, that as the name of the corporation suing is the same as that to which the defendant promised to pay one of the sums of two hundred dollars, the action as to that is well brought. We cannot see how this can be so. The directors of the original Shelbyville and Rushville Turnpike Company, to which the defendant promised to pay two hundred dollars, never fixed the amounts in which, or the times when, the payments should be made. This was done by the directors of the pretended consolidated company, who were not authorized to act, or pretending to act, for the separate companies.

The judgment is affirmed, with costs.

B. F. Love, M. M. Ray, G. H. Voss, B. F. Davis, and J. A. Holman, for appellant.

A. Major and S. Major, for appellee.

HULSMAN *v.* THE STATE.

APPEAL from the Marion Criminal Court.

BUSKIRK, J.—The appellant was indicted and convicted for selling intoxicating liquors on Sunday, and permitting them to be drank upon the premises where sold. This case is in all its legal aspects the same as the case of *Lehritter v. The State*, ante, p. 383, and is affirmed upon the ruling in that case.

W. W. Leathers, C. Byfield, and D. Howe, for appellant.

J. C. Denny, Attorney General, *R. P. Parker, H. Lee, and J. B. Elam*, for the State.

Shanefelter *et al.* v. Kenworthy.

SHANEFELTER ET AL. v. KENWORTHY.

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PRACTICE.—*Motion to Strike Out.*—Where a complaint contained three paragraphs, each based on the same written instrument, and the court overruled a motion to strike out one of the paragraphs and a part of another because they made the complaint cumbersome and voluminous ;

Held, that the ruling was not an error for which the judgment would be reversed.

VENDOR'S LIEN.—The holder of a written promise to pay money, which is shown to have been given by a purchaser of real estate for the purchase-money, has an equitable or vendor's lien on the real estate.

APPEAL from the Boone Circuit Court.

PETTIT, J.—The transcript in this case was filed in this court on the 28th day of December, 1870, before the present judges came into office on the first Monday of January, 1871, and has been out of the office of the clerk and in the possession of the attorneys of one or the other of the parties for about two years. The complaint is as follows :

“Thomas P. Kenworthy complains of Edward J. Shanefelter and William C. Bray, defendants, and says that on the 25th day of December, 1867, the defendants, in the name of Shanefelter & Bray, executed an instrument in writing, which was duly signed and stamped, and was agreed upon and intended by the parties thereto as a lien and equitable mortgage upon the following described property, in Boone county, State of Indiana, viz.: a part of the south-west quarter of the north-east quarter of section thirty-six, in township nineteen, range one west, commencing on the west line of said quarter section, at a stake in the center of the Crawfordsville state road, thence east in the center of said road thirty-seven rods, to the boundary line of the Lafayette and Indianapolis railroad, thence north-westerly with said railroad line thirty-nine rods and six feet to the said western boundary line of said south-west quarter of the said north-east quarter of said section, township, and range aforesaid, thence south nineteen and one-half rods, to the place of beginning, together with the steam flouring mill and all the machinery and fixtures belonging thereto, to this plaintiff,

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to secure the payment of the sum therein named, to wit, two thousand and fifty dollars, with interest thereon from date, a copy of which instrument in writing is herewith filed and made a part hereof; that said mortgage was duly recorded in the office of the recorder of said county of Boone, on the 6th day of January, 1868; that there is yet due thereon the sum of sixteen hundred and eighteen dollars and fifty-two cents.

“Wherefore the plaintiff demands judgment for the sum of seventeen hundred dollars, a foreclosure of the mortgage aforesaid, and that the mortgaged premises, or so much thereof as may be necessary to satisfy said debt, interest, and cost, be sold and applied to the payment thereof, and for other proper relief.

“Par. 2. Said plaintiff further complains of the defendants, and says that on the 25th day of December, 1867, said defendants, by their promissory note, signed Shanefelter & Bray, a copy of which is filed herewith, promised to pay the plaintiff, one year thereafter, the sum of two thousand and fifty dollars (\$2050.00), with ten per cent. interest; that the said debt was for the purchase-money of the property therein described; that there is now due and unpaid thereon the sum of sixteen hundred and eighteen dollars and fifty-two cents; wherefore the plaintiff demands judgment for seventeen hundred dollars, and prays that the same may be allowed a lien for purchase-money upon the property therein described, and for other proper relief.

“Par. 3. Said plaintiff, for further complaint herein, says that said defendants, on the 25th day of December, 1867, by their promissory note, a copy of which is filed herewith, promised to pay this plaintiff, one year thereafter, the sum of two thousand and fifty dollars, with ten per cent. interest from date; that there is yet due and unpaid thereon the sum of sixteen hundred and eighteen dollars and fifty-two cents; wherefore the plaintiff demands judgment for seventeen hundred dollars, and for other proper relief.”

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COPY OF INSTRUMENT SUED ON.

“\$2050.00.

LEBANON, Ind., Dec. 25th, 1867.

One year after date, we, or either of us, promise to pay Thomas P. Kenworthy, the sum of two thousand and fifty dollars (\$2050.00), with interest from date at ten per cent., without relief from valuation or appraisement laws; and this note is hereby made a lien on the following described real estate in Boone county, and State of Indiana, to wit: a part of the south-west quarter of the north-east quarter of section thirty-six (36), in township nineteen (19), range one (1), west, commencing on the west line of said quarter section, at a stake in the center of the Crawfordsville state road, thence east with the center of said road thirty-seven rods, to the boundary line of the Lafayette and Indianapolis Railroad, thence north-westerly with said railroad line thirty-nine rods and six feet (39 R. 6 ft.), to the said western boundary line of the said south-west quarter of the north-east quarter of said section, township, and range aforesaid, thence south nineteen and one-half (19½) rods to the place of beginning, together with the steam flouring mill and all the machinery and fixtures belonging thereto.

SHANEFELTER & BRAY.”

A motion was made to strike out a part of the first and all of the third paragraph of the complaint; this motion was overruled and excepted to. We think there was no error in this ruling which ought to reverse the judgment, because all three of the paragraphs of the complaint were on the same instrument, and the appellants were bound to take notice of its legal meaning; and the court's refusal to strike out a part of one and the whole of another paragraph of the complaint, because they made it cumbersome and voluminous, is not a sufficient reason for the reversal of the judgment.

The defendants filed the following answer:

“1. The defendants, for answer to the first and second paragraphs of the complaint, say that, on the 9th day of February, 1870, they conveyed by deed of assignment the property described in said paragraphs, together with all and

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singular their other personal and real property held by them as partners or otherwise, to James Nealis and James Coombs for the benefit of all their creditors; so that they have no interest in or title to the said property in the complaint mentioned; wherefore they demand judgment.

“2. The said defendants deny each and every allegation in the second paragraph of the complaint; wherefore they demand judgment for proper relief.”

There was a demurrer for want of sufficient facts filed to the first paragraph of this answer, and although it is assigned for error that the court sustained the same, we are not able to find by the record that any ruling was had on it. Moses C. Culver, Edward L. Sinker, Daniel Yandes, and George B. Yandes were admitted as parties defendants, and filed their answer and cross complaint, which were stricken out on motion. They are not made a part of the record by being copied in a bill of exceptions, and we cannot take any further notice of them.

Afterward, the original defendants, Shanefelter and Bray, filed the following answer :

“The defendants come, and for answer to the first and third paragraphs of the complaint herein, say that they deny each and every allegation therein, and pray that the court may require proof of the said allegations in the said paragraphs of the said complaint, and for other proper relief.”

Afterward, James Nealis and James Coombs, as assignees of the original defendants, Shanefelter and Bray, were made parties defendants, who answered that they, as such assignees of Shanefelter and Bray, sold the property in dispute at public auction, and now have the proceeds in their possession, and have no other interest in the property. No notice is taken of this answer in any form in the record. The case was tried by the court, and there was a finding for the plaintiff for one thousand seven hundred and thirty-five dollars, and that the instrument sued on is an equitable mortgage, and that the sum so found due is a specific lien on the property described in said instrument, and that

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the equity of redemption ought to be foreclosed and the property sold to satisfy said sum and costs.

A motion for a new trial for these reasons was filed:

“ 1. The finding of the court is contrary to law and is not sustained by sufficient evidence.

“ 2. Error of law occurring at the trial, the sustaining of the motions of the plaintiff to strike out the answers of the defendants E. L. Sinker & Co. and the answer of Moses C. Culver.”

This motion was overruled, and we cannot see why it was not properly done. If the instrument sued on was given for purchase-money, as stated in the second paragraph of the complaint, it was an equitable or vendor's lien on the real estate; and as the evidence is not in the record, we cannot say that the finding is not sustained by it.

As to the second cause for a new trial, as the answers are not legally before us, not being in a bill of exceptions, we cannot say that the court erred in striking them out.

Judgment was rendered on the finding for the amount of money, that the same was a lien on the realty, etc., and that if not paid, the property should be sold, etc.

We have bestowed great labor on the ill-made transcript, but we have not been able to find that the court below committed any error, for which the judgment should be reversed.

The judgment is affirmed, at the costs of the appellants.*

A. J. Boone and *R. W. Harrison*, for appellants.

*Petition for a rehearing overruled.

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PRACTICE.—Assignment of Error.—“ *On the Transcript.*”—When there is no assignment of errors “on the transcript,” as required by section 568, 2 G. & H. 275, the appeal will be dismissed on motion of appellee, although such assignment be made upon a detached paper among the papers in the case.

The State, *ex rel.* Irish, *v.* Klaas, Trustee.

APPEAL from the Vigo Common Pleas.

WORDEN, J.—In this case there is no assignment of errors “on the transcript,” as required by the statute. 2 G. & H. 275, sec. 568. There is among the papers filed in the cause what purports to be an abstract of the record, and on this paper there is an assignment of error. It was clearly intended that errors should be assigned, in the language of the statute, “on the transcript,” and not on loose and detached pieces of paper. A motion which the appellee has filed to dismiss the appeal for the want of a proper assignment of error must be sustained.

The appeal is dismissed, with costs.

R. Dunnigan, for appellants.

M. M. Ray, G. H. Voss, B. F. Davis, and J. A. Holman, for appellee.

THE STATE, EX REL. IRISH, *v.* KLAAS, TRUSTEE.

APPEAL from the Lake Common Pleas.

PETTIT, J.—On the transcript, the names of the parties are reversed. Klaas, trustee, should be placed as the appellant, and the State, *ex rel.* Irish, as the appellee. This awkwardness might not dispose of the case; but the transcript is neither paged nor numbered by lines, for which the submission should be set aside. Rule 19 of this Court, 32 Ind.

But the assignment of errors has no names to it, either appellants, or appellees, and for this last defect the appeal, under many decisions of this court, must be dismissed. Rule 1, of this Court, 32 Ind.

The appeal is dismissed, at the costs of the appellant.

M. Wood and L. J. Wood, for appellant.

J. Barnard and M. C. Barnard, for appellee.

RYAN v. BURKAM ET AL.

ATTACHMENT.—Filing Claims under Original Proceeding.—Garnishee.—A writ of garnishment, issued and served under an original attachment proceeding, holds all money or property belonging to the attachment defendant, in the hands of the garnishee at the time the writ is served, not only for the original plaintiff, but for all creditors that may, under the statute, file claims under the original proceeding before the final adjustment thereof.

SAME.—Where, after an attachment proceeding has been commenced, a creditor of the attachment defendant files a complaint, affidavit, and undertaking, and there is anything in the record which shows an intention to file under the original proceeding, and not to commence an independent action, such creditor will be held to have become a party to the original action.

SAME.—Affidavit.—The affidavits of different creditors filing an under attachment proceeding need not be based on the same cause of attachment.

SAME.—Garnishee.—When not Discharged.—A person who has been served as garnishee in an original attachment proceeding, and who at the time of service has money in his possession belonging to the attachment defendant, on being informed by the attorney of the plaintiff that the proceedings have been compromised and dismissed, and by such delivery be released from his liability as garnishee to another creditor of the defendant who has commenced proceedings by filing under the original suit, though the garnishee has not had actual notice of such filing.

SAME.—How Garnishee may be Discharged.—A person who has been served as garnishee may shield himself from liability by delivering money or property in his possession to the officer serving the writ, or by paying the money into court. If he fails to do this, he must retain the money or property until the final adjustment of the suit.

SAME.—Dismissal of Original Proceeding.—The dismissal of an attachment proceeding by the original plaintiff is not a final adjustment, if other creditors have filed under the same.

SAME.—Time of Lien.—The claims of creditors who commence their action by filing under an original attachment suit are liens on money or property in the possession of a person served as garnishee from the time of the service of the original writ.

BILL OF EXCEPTIONS.—A bill of exceptions when properly signed and in the record imports absolute verity.

APPEAL from the Wayne Circuit Court.

BUSKIRK, J.—The record in this cause discloses the following facts :

On the 16th day of December, 1859, Charles B. Burkam

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commenced proceedings in attachment against William D. Burkam and Alexander Dasher, before A. W. Ray, a justice of the peace of Wayne county. The action was based upon an account. The affidavit for attachment charged that Dasher was about to sell, convey, and otherwise dispose of his property subject to execution, with the fraudulent intent to cheat, hinder, or delay his creditors. The proceedings were based upon the 6th clause of section 156, 2 G. & H. 137.

The undertaking was filed and approved, December 17th, 1867. On the same day that the affidavit for attachment was filed, an affidavit was filed on behalf of the plaintiff, averring that the American Express Company had property of the defendant Dasher in its possession, and praying a writ of garnishment against the said express company.

On December 17th, 1867, the summons against Burkam and Dasher was returned served by reading to Burkam, and on Dasher by leaving a copy at his residence. The writ of garnishment was returned, on the same day indorsed thus: "Served by reading to Mr. Dalyell, agent of the American Express Company at Cambridge City, Indiana, and have attached under this writ a package supposed to contain money in his hands, addressed to Alexander Dasher. John Williams, Constable." On December 18th, 1867, the constable made another return, which reads thus: "Served by reading to Mr. Dalyell, agent of the American Express Company at Cambridge City, Indiana, this the 18th day of December, 1867. John Williams, Constable."

On December 18th, 1867, Charles B. Burkam filed a claim for about three thousand dollars, under the first attachment, filing in substance the same affidavit and a second undertaking; whereupon the justice of the peace immediately certified the case to the circuit court, in accordance with the act of March 4th, 1859, 2 G. & H. 148.

On the 28th of December, 1867, after the cause was in the circuit court, the appellant, Thomas F. Ryan, filed his

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complaint against the same defendants, Burkam and Dasher. The heading of this complaint was as follows:

“Thomas F. Ryan }
 v. } In Wayne Circuit Court.
 Burkam *et al.* }

“Action and attachment and garnishment commenced before Esq. Ray, and certified to Wayne Civil Circuit Court.”

The complaint then proceeds to state the cause of action. The action was based on two notes, amounting in the aggregate to something over twenty-six hundred dollars. With this complaint the appellant filed his affidavit and undertaking. The undertaking is in the usual form. The affidavit charges non-residence on the part of Burkam, and that the defendants have sold and are about to sell property, etc., with the intent, etc., covering both the fifth and sixth causes laid down in the statute. The affidavit makes the same averments as to the American Express Company's holding money belonging to Dasher, as in the original affidavits. The complaint contains these words: “And said Thomas F. Ryan prays that he may be made a party to the above entitled cause,” etc. The clerk issued a new summons in attachment and a new writ of garnishment.

On the night of December 28th, 1867, being the night of the same day on which the appellant had filed his papers as above stated, the attorneys for the plaintiff and the defendants in the original action made an arrangement by which the original suit was, in a certain contingency, to be dismissed; and between ten and eleven o'clock at night they filed with the clerk of the Wayne Circuit Court the following paper:

“C. B. Burkam, }
 v. } Wayne Circuit Court, February
 William D. Burkam } Term, 1868.
 and Alexander Dasher. }

“If I send no different word by M. Wilson, dismiss the above cause of this date.

“December 28th, 1867.

GEORGE A. JOHNSON,
 “Att'y for Pl'ff.”

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After the above paper was filed with the clerk, the said attorneys went to Cambridge City, where the defendant Dasher and Mr. Dalyell resided. After an interview with Mr. Dasher, he gave to Mr. Wilson, his attorney, an order to Mr. Dalyell, the agent of the American Express Company, to deliver up the package of money held by him and which had been garnished in his hands. The said attorneys then went to the depot and found Mr. Dalyell, to whom the order was presented. They informed Mr. Dalyell that the original suit had been compromised and the case dismissed. Mr. Dalyell delivered the package of money which was then and there opened and found to contain twenty-four hundred dollars. The money was equally divided between the said attorneys. Mr. Wilson testified that he had heard before he went to the clerk's office, that Mr. Ryan had commenced his proceedings, but that he did not make any inquiry in reference thereto or examine the records to ascertain whether it was true; and that he had made an agreement with Mr. Johnson, attorney for the plaintiff, at the time the order to dismiss was signed, that if there was any "fly-up," the dismissal should be set aside; and that it was just about 12 o'clock on Saturday night when they got the package of money from Mr. Dalyell and divided it, and it may have been Sunday morning.

The following entry was made by the clerk in the order book, December 28th, 1867.

"C. B. Burkam, }
 v. } In vacation, Dec. 28th, 1867. No. 2058.
Wm. D. Burkam. }

"The plaintiff by his attorney comes and dismisses the above entitled cause, and files his dismissal in these words, to wit."

At the February term, 1868, of said court, the following entry was made:

"Charles B. Burkam }
 v. } No. 2058.
Wm. D. Burkam *et al.* }

"The plaintiff by counsel comes and dismisses this cause at his own costs."

At the said term of court, Dalyell filed his written motion to be discharged as garnishee. The motion recited in substance the history of the case which we have given, and the discharge was mainly claimed upon the ground that he had in good faith supposed that the original action had been dismissed, and that he had delivered the money so believing, and without any knowledge of the commencement of the proceedings by Ryan. There does not seem to have been any ruling by the court on this motion, but this, in no manner, affects the real questions in the case.

After divers motions to quash the writs in attachment, and demurrers to pleadings, none of which need be particularly noticed, the case was put at issue upon the complaint and affidavit of Ryan.

Burkam answered,

1. That the notes sued on were executed by Dasher in his individual capacity, and not as a partner of defendant.
2. That the notes were executed without any consideration.
3. The general denial.

A demurrer was sustained to the first, and issue taken on the second.

Dasher answered, 1. *Non est factum*, under oath. 2. That the notes were without consideration. 3. The general denial.

Burkam and Dasher answered jointly,

4. That partnership between Burkam and Dasher was dissolved before the notes were given, and that Ryan knew the fact.

5. That said notes grew out of a fraudulent whiskey transaction, in which the United States government was defrauded out of her revenue.

The fourth paragraph was held good as the separate answer of Dasher. Issue was taken on all these answers.

Dalyell answered under oath. The substance was, that he had, on the night of the 28th day of December, 1867,

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delivered to the attorney of Dasher the package of money in his hands as agent of the American Express Company; that the writ of garnishment issued in the proceedings by Ryan was not served on him until the 30th day of December, 1867; and that at that time he did not have in his hands or under his control any money belonging to either Burkam or Dasher.

Before the commencement of the trial, the appellant moved the court for leave to prosecute his action as a part of and under the original action, but the leave was refused, and he excepted and reserved the question by a bill of exceptions.

The cause was, by agreement, submitted to the court for trial.

The court found:

1. For Ryan as against Burkam and Dasher, in the sum of \$3097.54.
2. For Ryan against Alexander Dasher on the attachment, and held the attachment good as to him.
3. In favor of the American Express Company and Dalyell, agent of such company.

No finding is announced as to Burkam on the attachment.

Appellant by his counsel at the time excepted to the finding in favor of the express company and Dalyell as agent thereof.

The appellant then moved the court for judgment against the American Express Company and James Dalyell, agent thereof, on the finding, but the motion was overruled, and appellant excepted.

The appellant then moved for a new trial, assigning for cause:

1. Error in finding in favor of American Express Company and James Dalyell, agent, because such finding was contrary to law and not sustained by the evidence.
2. Error in overruling appellant's motion for judgment on the findings against American Express Company and James Dalyell, agent thereof.
3. Error in finding in favor of Burkam on attachment.

4. Error in refusing to permit Ryan to prosecute this cause under the original attachment proceedings. The court overruled the motion, and the appellant excepted.

The court rendered judgment in accordance with the findings, and Ryan appeals to this court. The evidence is all in the record, and the motions and rulings thereon and exceptions taken are properly set forth in the bill of exceptions.

All the errors assigned in this cause, excepting the sixth, which has been waived, and all the exceptions taken to the rulings of the court below, may be considered and disposed of in the examination and decision of a single question, namely: Had the appellant the right to prosecute his claim under the original attachment proceedings? The answer to this question will be decisive of this case; for if the action and proceedings of the appellant were independent, then the finding and judgment of the court were correct, but if he filed under the original proceedings in attachment, the finding and judgment of the court were erroneous, and must be reversed. The primary inquiry is, did the appellant file his claim under the original proceedings in attachment? or did he commence a new and independent action?

There are certain facts established by the record, which are not controverted. We will first ascertain these facts, and then consider their effect upon the controverted questions.

1. The original proceedings before justice Ray were properly brought, were regular and in conformity with the statute, and were correctly certified to the circuit court.

2. The writ in garnishment of the American Express Company and Dalyell, agent thereof, was legally issued and served under the original attachment, before the case was certified to the circuit court, and was in full force and binding upon the express company, after the cause was certified to and docketed in the circuit court.

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3. At the time the writ in garnishment was served, and at the time the cause was certified to the circuit court, and for some time thereafter, the American Express Company, by her agent, James Dalyell, had in her possession and under his control some twenty-four hundred dollars of money belonging to Alexander Dasher, one of the defendants in the original proceedings.

4. At the time that Ryan, appellant, filed his claim and instituted his proceedings, in the Wayne Circuit Court, the original attachment proceedings, including the garnishment of the express company and Dalyell, agent, were still pending in that court and had reached no "final adjustment."

5. Ryan's claim and complaint were filed in the same court, and against the same persons that were defendants in the original attachment proceedings.

6. Ryan filed the necessary complaint, affidavit, and undertaking required by the statute. His affidavit contains the same cause of attachment as that stated in the affidavit in the original proceeding, with an additional one, but that will not vitiate it as a filing under the original proceedings. The statute does not require the affidavits of different creditors to be based upon the same cause of attachment; it only requires each affidavit to comply with the law in setting up some statutory cause for attachment.

7. The attachment was sustained upon trial by the court as against Dasher, the defendant whose money was garnished in the hands of the agent of the express company.

8. In our opinion, it is very satisfactorily, if not conclusively, shown that Ryan filed his claim under the original attachment proceedings. This is shown by the heading of his complaint and the prayer at its close, heretofore set out. If he was commencing an independent action, why refer in his complaint to the proceedings commenced before Esq. Ray and certified to the Wayne Circuit Court? and why in the close of his complaint pray that he might "be made a party to the above entitled cause?" He was a party to his own cause. Then, what cause was it that he wanted to be

made a party to? It could not well refer to any other than the one mentioned in the heading of his complaint. The clerk of the court certainly understood that Ryan had filed his claim under the original proceedings, for he issued no new summons against the defendants, Burkam and Dasher. Burkam and Dasher so understood it; for they appeared and answered Ryan's complaint without the service of any new summons upon them; and their understanding is more fully shown by their motion to quash the writ of attachment, the third reason whereof is as follows: "3. Because the grounds of attachment are stated differently in this case from the case of C. B. Burkam, which has been dismissed, and, therefore, Ryan's cannot properly be filed under Burkam's claim." Dalyell, agent of the American Express Company, so understood it, as is shown by his motion and affidavit to be discharged as garnishee, in which several reasons are assigned, and among others, the same as the third reason urged by Burkam and Dasher why Ryan could not properly prosecute his claim under the original attachment proceedings; but his understanding is more fully and clearly shown by his answering Ryan's complaint; for he was not required to answer at all, unless the defendants, Burkam and Dasher, were legally in court, and they were not in court at all, as to Ryan's claim, unless it was filed under the original attachment, for no new summons had been issued and served, as has been shown. When the attachment defendants have been personally served, the garnishee has no interest in the question of jurisdiction; but when they have not been so served, or have not appeared to the action, the person summoned as a garnishee should raise the question of jurisdiction before answering, and need not answer at all unless jurisdiction has been acquired. *Schoppenhast v. Bollman*, 21 Ind. 280; *Beard v. Beard*, 21 Ind. 321; *Harmon v. Birchard*, 8 Blackf. 418; *Richardson v. Hickman*, 22 Ind. 244.

It is quite manifest to us that the attorneys in the original action understood, or had a very strong intimation, that Ryan had filed his claim under the original proceedings; for in no

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other way can the character and manner of the compromise and attempted dismissal be accounted for.

We do not deem it necessary to decide whether the paper filed with the clerk on the night of the 28th of December, 1867, amounted to a dismissal of the cause; for it is not pretended that the original action had been dismissed, or that any attempt had been made to compromise and dismiss it, prior to the time when Ryan filed his claim thereunder. Conceding that the original action was dismissed the night of the day on which Ryan filed his claim, such dismissal could not affect or destroy his right to hold every advantage and every dollar in money and all property that was held by the original proceedings. Sec. 187, 2 G. & H. 148; *Henderson v. Bliss*, 8 Ind. 100; *Shirk v. Wilson*, 13 Ind. 129; *Rugg v. Johnson*, 13 Ind. 437; *Schmidt v. Colley*, 29 Ind. 120.

Ryan having filed his claim under the original attachment proceedings before there had been a final adjustment, has the right to hold the American Express Company and James Dalyell, agent thereof, upon the garnishment issued and served under the original attachment proceedings. No new writ of garnishment was required, and the fact that the clerk unnecessarily issued a second writ does not in any manner release or weaken Ryan's rights under the first writ of garnishment. The case of *Schmidt v. Colley*, *supra*, is decisive of this point. But if there were no adjudications upon the point, the statute upon this whole subject is too plain and direct in its meaning and wording to permit misconstruction or leave room for dispute. The writ of garnishment is an incident to, and an auxiliary of, the attachment. No writ of garnishment can be sustained unless it is issued in aid of an attachment proceeding commenced before, at the time, or after, the writ is issued. The affidavit upon which the writ of garnishment is permitted to issue must state that there is money or property that cannot be reached by virtue of the attachment, and when the writ of garnishment issues in advance of the attachment proper, "the affidavit must show

some one of the causes authorizing the attachment." Sec. 175, 2 G. & H. 144.

This is sufficient to show that no new writ of garnishment was necessary. The writ issued and served under the original attachment held all the money and property belonging to the defendants in the hands of the garnishee at the time of the service of the writ, not only for the original plaintiff, but for all creditors who might, under the statute, file claims under the original attachment at any time before the final adjustment thereof. But this is made certain beyond all cavil by the words of section 186 of the code, which reads as follows:

"Sec. 186. Any creditor of the defendant, upon filing his affidavit and written undertaking, as hereinbefore required of the attaching creditor, may, at any time before the final adjustment of the suit, become a party to the action, file his complaint, and prove his claim or demand against the defendant, and may have any person summoned as garnishee or held to bail, who has not before been summoned or held to bail, and propound interrogatories to the garnishee and enforce answers thereto, in like manner as the creditor who is plaintiff."

The above section makes several points very plain: 1. That Ryan had the right, at any moment of time before the final adjustment of the original suit, to file his claim thereunder. 2. That he became a party to the original suit by filing his complaint, affidavit, and undertaking, in such manner as indicated a purpose to prosecute under the original action. It was said by this court in *Schmidt v. Colley, supra*, that "section 186 of the code provides how that may be done, and service of a summons is not one of the things required. At any time, it may not be an hour, before the final adjustment of the original suit, a complaint, affidavit, and undertaking may be filed, and then the creditor who has performed these requirements may become a party and prove his claim. This is all that the statute, in terms, requires; and we perceive no sufficient reason for holding

that a new summons must issue on behalf of each creditor who chooses to avail himself of the pending cause. We believe that such a practice has never obtained anywhere, during the sixteen years that the code has been in force."

3. That when a writ of garnishment is once issued and served, under the original attachment proceeding, it holds good for all creditors filing under such proceeding, in the time and manner above stated. If such had not been the purpose of the legislature, the following words in the above quoted section, would never have been used, "and may have any person summoned as garnishee, or held to bail, who has not before been summoned or held to bail."

In the case under consideration, the record shows in the most conclusive manner that a writ of garnishment did issue against the express company and its agent, under the original attachment proceedings; that that writ was duly and legally served upon James Dalyell, the agent of the company; that he recognized the binding force of that writ; that when such writ was served, he held, as such agent, twenty-four hundred dollars of Dasher's money, which he continued to hold as garnishee under and by virtue of that writ; that while the original proceedings were still pending and undisposed of, the appellant filed his claim, complied with the statute, and brought his claim under the original attachment; that on the trial, and after a full investigation, the appellant established his claim against Burkam and Dasher, and his attachment was held good as to Dasher, whose property was garnished in the hands of the express company; and that the agent of such company delivered the money so garnished to the attorney of Dasher before any final adjustment of the original suit.

It remains to inquire whether the fact that James Dalyell, the agent of such company, upon being informed by the attorneys in the original attachment proceedings that such suit had been compromised and the case dismissed, paid the money to the attorney of Dasher, releases and discharges such company from liability under the said garnishment. It

is very earnestly insisted by counsel for the express company and Dalyell, that Dalyell acted in perfect good faith, honestly believing that the original action had been compromised and dismissed, and did not know that Ryan had commenced his action.

In our opinion, the liability of the express company does not depend upon the good faith of its agent. The question is, did the agent comply with the law?

There were two ways in which the agent of the express company might have shielded it from all liability. In the first place, the garnishee might have delivered the money or property in his possession to the officer serving the writ, or paid the money into court, and this would have discharged the company from all liability. Secs. 184, 185, 2 G. & H. 147.

It is provided in section 176 of the code, 2 G. & H. 145, that "from the day of the service of the summons, the garnishee shall be accountable to the plaintiff in the action for the amount of money, property or credits in his hands, or due and owing from him to the defendant."

We have seen that the garnishee is not only accountable to the original attachment plaintiff, but to all creditors who may file their claims before the final adjustment of the original suit. It was held by this court, in *Cleneay v. The Junction R. R. Co.*, 26 Ind. 375, that "a payment, after the service of the summons of garnishment, to the attachment defendant, or his general assignee for the benefit of creditors, will not discharge the garnishee defendant."

The agent is charged with a knowledge of the law, and was, therefore, bound to know that any other creditor had the right to file his claim under the original attachment proceedings at any time before the final adjustment thereof, and share in a distribution of the money in his hands.

The agent is presumed to have known that the dismissal of the original action, by the first attaching creditor, would not operate as a dismissal of the action or proceedings of any subsequent attaching creditor, or in any manner impair or defeat the rights of such subsequent attaching creditor,

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which he had acquired by filing under the original proceedings. Sec. 187 of the code, 2 G. & H. 148.

The agent is presumed to have known that no final judgment could have been rendered against him, until the action against the defendant in attachment was determined. Sec. 180, 2 G. & H. 146; *Henderson v. Bliss*, 8 Ind. 100.

The agent is presumed to have known that the claims of other creditors, filed under an attachment suit, are, under our statute, liens from the time the original writ was placed in the hands of the officer. *Shirk v. Wilson*, 13 Ind. 129.

The agent of the express company, having failed to deliver the money in his hands to the officer, or to pay it into court, was bound to retain the money in his hands until the final adjustment of the suit; and the dismissal of the action was not such final adjustment, if other creditors filed under the original proceedings. The agent relied upon the representations of others. He was not shown any order dismissing the action, or any certificate of the clerk showing that the action had been dismissed. But the agent would not have been justified in delivering the money upon the most satisfactory evidence of the dismissal of the original action, without ascertaining whether other claims had been filed thereunder. The agent was not content to abide the order of the court, but assumed to act upon his own responsibility; and in such case he was bound to exercise great care and prudence, to prevent injury to others. This he did not do.

Counsel for the express company have pressed upon our consideration the great hardship which would result if the company should be required to pay this money again. We admit the force of the argument, but cannot permit it to influence our judgment. When courts undertake to avoid an apparent hardship, they are very apt to depart from the long and well settled principles of the law, and thereby establish a precedent which would produce greater injury and hardship than the one attempted to be avoided. The duties and liabilities of garnishees are clearly defined by the statute and the repeated adjudications of the courts, and we

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possess no power to relieve them from their liability. In the present case, the agent failed to pay the money into court or to abide the order and judgment of the court, but acted upon his own judgment. The company cannot be relieved from liability under such a state of facts.

We are very clearly of the opinion that the court below erred in refusing to permit the appellant to prosecute his claim under the original proceedings in attachment, and in finding for the express company and its agent upon the evidence in the cause; for which errors the judgment as to the American Express Company and James Dalyell, its agent, must be reversed.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to grant a new trial as to the American Express Company and James Dalyell, its agent, and for further proceedings in accordance with this opinion.

ON PETITION FOR A REHEARING.

BUSKIRK, J.—A very earnest and elaborate petition for a rehearing has been filed. The principal reason assigned for a rehearing is, that the court erred in holding that Ryan filed under the attachment proceedings instituted by Burkam against Burkam and Dasher, and that he had the right to prosecute his action under such proceeding. In the original opinion it was stated, that, upon filing the complaint of Ryan, the clerk issued new writs in attachment and garnishment, but that no new summons was issued against the defendants in the original action. It is insisted that the court was mistaken in stating that no summons was issued, and it is claimed that it appears from the record a new summons was issued and served upon such defendants. Such fact may be shown by the files or records in the court below, but from a very careful and repeated examination of the transcript, we have been unable to find any such statement, or any statement from which such fact might be inferred.

It is also insisted that the ruling in this case is in conflict

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with the case of *Sturgis v. Rogers*, 26 Ind. 1. In that case the question arose whether certain parties had commenced independent actions and proceedings in attachment, or had become parties to the original action and attachment proceedings. The court, in the statement of the facts of the case, say: "On the 19th and 20th of December, the other plaintiffs filed complaints and claims 'under said attachment suit,' as is stated by the clerk in making up the transcript, but it does not appear by the record that they or any of them became or applied to become parties to the original action commenced by Rogers. They filed affidavits and undertakings, alleging in the former the non-residence of Ellis and Sturgis, and their complaints are as usual in independent suits." The court, after stating the rendition of the judgment in the original action, say :

"The other creditors, plaintiffs here, took their separate judgments against Sturgis and Ellis by default at the same term, on the 23d of January, 1856."

The court, on page 9, say: "To determine whether any of the present plaintiffs but Rogers can maintain a suit upon the appeal bond, it is important to enquire whether they became parties to the attachment suit commenced by Rogers. This must be ascertained exclusively by an inspection of the record. It can appear in no other way. Those persons might have become parties to that suit so as to share with Rogers in the judgment against the garnishee (2 G. & H. sec. 186, p. 147), or each of them might have chosen to commence an independent suit. Nothing upon the subject can be legally inferred from the fact that they filed their complaints and took their judgments at the same term at which the suit by Rogers was pending and determined, for that they might lawfully do without becoming parties to his suit. 'Nor are we aided by the statement of the clerk made in the transcript, after the record in the Rogers case, that 'the following cases are filed as claims under said attachment,' followed by transcripts of the records of those other cases. The fact as to who have become parties to a

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suit in a court of record cannot rest merely in the memory of the clerk. The record itself must disclose it. The judgment against the garnishee, though in favor of Rogers alone, but containing an order for the payment out of the amount thereof of the several sums 'that are due to the several plaintiffs in the proceedings,' is the only indication in the entire record that Rogers was not the sole party plaintiff in that suit. But this alone is obviously insufficient, for it fails to show who those other parties were. And as the whole transcript is made part of the answer, and it discloses no party plaintiff but Rogers, there is no method of avoiding the conclusion that Rogers was legally the only party plaintiff to the attachment suit against Sturgis and Ellis, and the only party before us, therefore, having an interest in the judgment against the garnishee in that suit."

We have made an extended quotation from the case mainly relied upon by counsel in their brief for a rehearing, for the purpose of showing fully the grounds upon which it was based, and that it is clearly distinguishable from the one under examination. In that case, the only evidence of a filing under the original attachment proceedings was the recital by the clerk, and that portion of the judgment which provided for the payment of the several sums due to the several plaintiffs in the proceedings. The entry made by clerk was a nullity, and could not be considered by the court for any purpose. *Keslerv. Myers*, 41 Ind. 543. The judgment failed to show who the other parties were. There was, then, no legal evidence showing that the plaintiffs in that action, other than Rogers, had become parties to the original attachment proceedings. The court say that the question of whether such persons had become parties to the original action must be determined exclusively by the record. This we concede is right. The court, however, in their history of the case say, that it does not appear by the record that they or any of them became or applied to become parties to the original action commenced by Rogers.

Let us apply the principles decided in the above case to

Harlan v. Watson et al.

Afterward, the defendants and garnishee appeared to the action of Ryan, without raising any question affecting the jurisdiction of the court. The case was appealed to this court, but there is no assignment of error calling in question the jurisdiction of the court below. Under the settled rules of practice of this, and we believe all other appellate courts, the question cannot be raised for the first time upon a petition for a rehearing.

We are entirely satisfied with the original opinion and judgment pronounced in this case. The petition is overruled.

J. E. McDonold, J. M. Butler, and E. M. McDonald, for appellant.

C. H. Burchenal, J. P. Siddall, and G. A. Johnson, for appellees.

HARLAN *v.* WATSON ET AL.

APPEAL from the Tipton Circuit Court.

PETTIT, J.—This appeal has once before been dismissed, and the transcript, by leave, withdrawn, refiled, and submitted. It must again be dismissed for the same reasons as before. See 39 Ind. 393. Since the former dismissal there has been no change in the assignment of errors, nor has notice been given to the co-parties of the one appealing, as required by 2 G. & H. 270, sec. 551.

The appeal is dismissed, at the costs of the appellant.

D. Moss and N. R. Overman, for appellant.

J. W. Robinson, J. Green, and D. Waugh, for appellees.

Spurgin v. McPheeters.

SPURGIN v. MCPHEETERS.

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BILL OF EXCHANGE.—A. sued B. upon the following instrument :

“ Mr.” B :

“ Sir, Please pay to ” A. “ or order the sum of one hundred and nineteen dollars on said bill of $1\frac{3}{4}$ in. lumber, and oblige the firm of ”

[SIGNED.]

C. & Co.

“ I accept.”

[SIGNED.]

B.

Held, that the instrument possessed all the characteristics of a bill of exchange, and the action was by the payee against the acceptor.

SAME.—*Pleading*.—*Evidence*.—Allegations and evidence of matters in contradiction of the written instrument were inadmissible.

SAME.—*Consideration*.—The consideration of a bill of exchange may be inquired into, or a set-off pleaded, by the drawer against the payee, by the payee against the indorsee, and by the acceptor against the drawer. But this can not be done as between the payee and acceptor.

SAME.—*Accommodation Bill*.—It is no defence or bar to an action by the payee against the acceptor of a bill of exchange, that the bill was known to the holder to be an accommodation bill between the other parties.

SAME.—*Consideration*.—An allegation, that the holder of a bill of exchange did not part with any money or property on the faith of the bill, is not a sufficient reason why he should not recover on it. The discharge of a pre-existing debt of the drawer is sufficient.

APPEAL from the Putnam Common Pleas.

DOWNEY, J.—Suit by McPheeters against Spurgin on the following instrument :

“ GREENCASTLE, IND., Aug. 22d, 1870.

“ Mr. D. M. Spurgin :

“ Sir, Please pay to Jesse McPheeters, or order, the sum of one hundred and nineteen dollars on said bill of $1\frac{3}{4}$ in. lumber, and oblige the firm of

“ GEO. W. HINTON & Co.”

and the acceptance thereof, as follows:

“ I accept. D. M. SPURGIN.”

In the complaint, the instrument is called an order, and it is alleged that the defendant fails and refuses to pay the same, although payment thereof has been demanded of him.

Spurgin pleaded that he made the indorsement on the order named in the plaintiff's complaint, but he avers that

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at the time of making the same the said drawers of said order, Geo. W. Hinton & Co., were indebted to the plaintiff in the sum of \$119.44; that the plaintiff did not part with any money or property on the faith of said order; and that said firm was then, and the individual members of said firm, to wit, Richard H. Carrington, George W. Hinton, and ——— McDonald, then were, and ever since have been, and now are, notoriously insolvent; that at said time the said firm of George W. Hinton & Co. had a contract with the defendant to saw and deliver to him a bill of $1\frac{3}{4}$ in. poplar lumber, the same to be delivered on the cars on the Indianapolis and St. Louis Railroad, in Greencastle, in said county, and to be paid for by defendant when 30,000 feet of said lumber was so delivered, and not until then; that the order was drawn with reference to said contract, and no other; that plaintiff, at the time, had full knowledge as to said contract, and that said order had reference thereto; that at the time of defendant's said indorsement on said order, he was not indebted to said firm of Geo. W. Hinton & Co. in any sum of money, which was well known to plaintiff; and that at no time since has he been indebted to said firm in any sum of money; that his said acceptance was with reference to said contract and thereunder, and that the same was a promise to pay the plaintiff the sum of money named therein, when, under said contract for $1\frac{3}{4}$ in. poplar lumber so to be sawed and delivered by said firm to the defendant, the defendant should become indebted therefor to said firm in said sum; that the same was so expressly understood and agreed at the time of said indorsement; and that the plaintiff received and accepted said order as aforesaid with full knowledge that the defendant was not then indebted to said firm of Geo. W. Hinton & Co.; and that defendant had contracted and agreed to pay said sum of money in said order named, only when said firm delivered to him under said contract said $1\frac{3}{4}$ in. poplar lumber, in value to the amount named in said order; and that plaintiff received and accepted said

order with full knowledge of the terms of said contract as aforesaid with reference to said order. As to fifteen dollars paid on the order by the defendant, he alleges that it was advanced to the plaintiff at his request as a loan and accommodation to him, and not as a payment on said order or on any indebtedness to said firm. It is alleged that said firm of Geo. W. Hinton & Co. failed and refused to deliver said lumber or any part of it on said contract, after the execution and acceptance of said order; wherefore, etc.

The plaintiff demurred to this paragraph of the answer, on the ground that the same did not state facts sufficient to constitute a defence to the action. The demurrer was sustained, the defendant refused to answer over, and thereupon there was final judgment for the plaintiff.

The ruling of the court on the demurrer to the first paragraph of the answer is the only action of the court of which complaint is made in the assignment of errors.

If the action was between Geo. W. Hinton & Co. and Spurgin, the facts alleged would show a set-off, or that there was no consideration for the promise, or that the consideration for the promise had failed. But the promise being from Spurgin to McPheeters, and the action being upon that promise, different considerations must govern in the decision of the question. The instrument which is the foundation of the action possesses all the characteristics of a bill of exchange. The action is by the payee against the acceptor. Are the facts alleged a good defence in such a case? Some of the allegations of the answer seem to us to set up and rely upon matters which are in contradiction of the written instrument and therefore inadmissible. Such is the allegation that the order was accepted with reference to the contract, and that the same was a promise to pay the plaintiff said sum of money when that amount became due under the contract, and that this "was expressly understood and agreed at the time of the indorsement." All such matters in the paragraph are wholly inadmissible either in the

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allegations or proofs. The consideration of a bill of exchange may be inquired into or a set-off pleaded by the drawer against the payee, by the payee against the indorsee, and by the acceptor against the drawer. Story Bills, sec. 187. But this can not be done as between the payee and the acceptor. It seems to us that all that is shown in the answer in the case under consideration is, that Spurgin accepted the order or bill for the accommodation of the drawer, and that this fact was known to McPheeters. It is no defence or bar that the bill was known to the holder to be an accommodation bill between the other parties, if he takes it for value, *bona fide*, before its maturity. Story Bills, sec. 191. That the holder did not part with any money or property on the faith of the bill is no reason why he shall not recover on it. *McKnight v. Knisely* 25 Ind. 336. If it was taken by McPheeters in discharge of a pre-existing debt of the drawers, that is sufficient to protect him. The allegation of the insolvency of the drawers is no reason why the acceptor should not pay. The defence of set-off, if that was intended to be the nature of the defence set forth in the answer, is not admissible as between the payee and acceptor. We are of the opinion that the paragraph of the answer is bad, and that the demurrer to it was therefore properly sustained.

The judgment is affirmed, with costs.

S. Turman and *J. Birch*, for appellant.

D. E. Williamson and *A. Daggy*, for appellee.

SUMNER ET AL. v. DUNKIN.

APPEAL from the Putnam Circuit Court.

WORDEN, J.—This was an action by the appellants against the appellee. Judgment for the defendant.

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We find no assignment of error upon the record for the appellants. There is a cross error assigned by the appellee, but as he has filed no brief, his cross error is regarded as stricken out. See Rule 14.

The appeal is dismissed, at the costs of the appellant.

S. Claypool and *L. P. Chapin*, for appellants.

D. R. Eckles and *C. C. Matson*, for appellee.

EGGLESTON v. CASTLE.

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INSTRUCTIONS TO JURY.—If instructions given to a jury, taken as a whole, present the law correctly, the judgment will not be reversed, though a single instruction, standing alone, might seem to be incorrect.

SAME.—Where instructions given embrace all there is of substance in instructions refused, there is no error in such refusal.

SAME.—An instruction inapplicable to any evidence given should be refused.

APPEAL from the Vermillion Circuit Court.

WORDEN, J.—This was an action by the appellee against the appellant, upon a promissory note executed by the defendant to Robert E. Stephens and William Frazier, and duly endorsed to the plaintiff.

The defendant answered in several paragraphs, the substance of the defence being that the note was given for sawing a lot of lumber, which the payees had undertaken to do under a special contract, and that they had failed to perform their agreement, in not sawing the lumber in accordance with the terms of the contract, both as to amount and the character of the work, and that the note had been procured by the false and fraudulent representations of the payees that they had in all respects performed the contract.

Replication, first in denial, and, second, that at the time the note was executed, the defendant, and Stephens, and Fra-

zier made full and complete settlement of all matters arising out of or connected with the contract for sawing lumber, with full knowledge of all the facts on the part of the defendant; that at the settlement Stephens and Frazier requested the defendant to estimate the lumber for himself, which he failed and refused to do, and waived doing; wherefore, etc. There is no question made in this court on the pleadings.

Trial, verdict and judgment for the plaintiff. The questions relied upon for a reversal are duly preserved. We will notice them in the order in which they are presented in the brief of appellant.

The court gave the following charge, among others, of its own motion: "5. If you find from the evidence that defendant accepted the amount of lumber at the figures stated by Frazier and Stephens, and gave his note for the balance due on the sawing, he is bound by it, and you should find for the plaintiff." It is urged against this charge that it takes from the consideration of the jury the alleged fraud in procuring the execution of the note, and assumes that the acceptance of the lumber and the giving of the note are conclusive against the defendant, however fraudulently these acts may have been brought about. Standing alone, the charge would seem to be open to the objection thus made. But the court gave, of its own motion, the following charge: "7. If Eggleston gave his note, with full knowledge of all the facts, and took the amount of lumber sawed at Frazier and Stephens' figures, and waived the right to measure it himself, and settled and gave his note, he is bound by the settlement, and you should find for the plaintiff."

And at the instance of the defendant, the court gave the following, among other charges: "6. That if the said Frazier and Stephens, or either of them, represented to this defendant that they had sawed for him 200,000 feet of lumber" (the amount specified in the contract), "and it turned out that there was only 165,000 feet, and the said defendant confided in said representation and had not the means of knowing the exact number of feet sawed, you will deduct the

amount of damages the defendant has sustained by reason of said deficit, whether the said Frazier and Stephens knew said representations to be true" (false?) "or not.

"7. The mere fact that Eggleston accepted and gave his note for this lumber is no bar to his recovering his damages in this case.

"9. The defendant, Eggleston, was under no obligations to go and see or measure the lumber, before he paid for it or gave his note; he had a right to rely on the express statement of Frazier and Stephens, that they had sawed him 200,000 feet of good lumber, such as the contract called for, and if their statements proved to be untrue, and there was not the amount of lumber called for, nor of the quality called for, and the defendant was misled by the representation to his damage, he is entitled to have the damages deducted from this note."

These charges, taken all together, leave nothing of which the appellant can complain. The appellant also objects that the charge was outside of the issues and not applicable to the evidence. There is nothing in these objections.

The next point made is, that the damages were excessive. We will pass this until we shall have considered the other questions in the cause.

The third point is, that the court erred in giving, of its own motion, charge number seven above set out. It is conceded by the appellant that the charge is correct as an abstract proposition, but it is insisted that it was inapplicable to the case made.

There is, in our opinion, no foundation for this objection.

The fourth and fifth points are, that the court erred in refusing to give charges numbered eight and fourteen, as asked for by the defendant. They are as follow:

"8. To hold that accepting and giving his note for the lumber, when it was open to the examination of both parties, on delivery, shall bar the defendant from recovering, when that acceptance and giving the note were procured by the

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fraudulent artifice of the assignors, Frazier and Stephens, which put the receiver off his guard and induced him to believe that the different piles of lumber contained so many feet, and that it was sound lumber, would be to set at defiance every principle of reason and justice.

“14. If the jury believe from the evidence that Eggleston refused to accept the lumber, when the sawing was completed, and did not accept the same until the 25th day of December, 1870, the lumber, from the time it was so sawed until it was accepted by Eggleston, was in the care and at the risk of Frazier and Stephens, and if any lumber was taken away by any one during the time between the 24th day of August and the 25th day of December following, Eggleston will not be responsible for that.”

The appellant says of the eighth charge thus asked and refused, that “it is rather on the Utopian style, yet it undoubtedly expresses the law in a clear and forcible manner,” and he adds that “it is almost an exact copy of the decision of this court in the case of *McAroy v. Wright*, 25 Ind. 22.”

In addition to the ninth charge given at the instance of the defendant, above set out, we here copy the eleventh, which was also given. “If the jury believe from the evidence that the said Frazier and Stephens, or either of them, made representations to the defendant, Eggleston, that were in fact false, whether either of them knew that said representations were false or not, but on the contrary believed them to be true, and the said Eggleston was misled by said representations to his damage, this would be a fraud on the said Eggleston that he could set up by way of counter-claim to this note.”

Taking the charges given together, they embraced quite all there is of substance in the eighth refused, unless the words “fraudulent artifice,” as used in the charge, mean something more than fraudulent representations; but there is no pretence of any other kind of fraud.

The fourteenth charge refused was perhaps designed to

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raise a question of some importance. The defendant, it seems, made an indorsement on the contract for the sawing, as follows: "Finished sawing August 24th, 1870." The question sought to be raised is, whether the lumber, after being sawed and before being accepted by Eggleston, was at his risk, or at the risk of Frazier and Stephens.

The contract was, that Frazier and Stephens were to place their mill upon the land of the defendant, and on his land cut the timber and saw it into lumber. We decline to pass upon this question, because it does not arise in the record. The charge was properly refused, because it was wholly inapplicable to any evidence offered on the trial. There was no proof offered to show that any of the lumber was taken away by any one except the defendant or persons authorized by him, or that he did not get all the lumber that was sawed by Frazier and Stephens under the contract.

There is no error in the record, unless it be that a new trial should have been granted because of excessive damages.

It is claimed by the appellant, and admitted by counsel for appellee, that the verdict and judgment are for the sum of seven dollars and sixty-one cents more than the amount due on the note for principal and interest; an error probably in the computation of the interest. The appellee, however, offers to remit the excess. The remission may be entered, and the judgment below is affirmed for the residue, with ten per cent. damages, at the costs of the appellant.

W. Eggleston, for appellant.

B. E. Rhoads and *M. G. Rhoads*, for appellee.

Holding, Adm'r, v. Smith.

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HOLDING, ADM'R, v. SMITH.

SUPREME COURT.—*Presumption in Favor of Judgment.*—The Supreme Court will presume, in favor of a judgment for the defendant, that an answer not on file, to which there is no demurrer in the transcript, contained a good defence.

NEW TRIAL.—*Motion.*—*Instruction to Jury.*—A motion for a new trial, because of erroneous instruction to the jury, must point out in what particular the court has misdirected the jury.

SAME.—*Evidence.*—A motion for a new trial on account of the admission of improper evidence must indicate what evidence has been improperly admitted.

APPEAL from the Shelby Common Pleas.

PETTIT, J.—This was a suit by the appellant against the appellee, to recover for the use and occupation of certain real estate. The deceased, of whom the plaintiff was administrator, was the mother of the defendant. The answer on which the trial was had was, 1st. General denial. 2d. Payment. 3d. Set-off for taxes paid, improvements made, taking care of, boarding, clothing, nursing, and paying physician's bills, etc., for the deceased, his mother.

The clerk says that the first paragraph of the answer is not on file, and is not, therefore, found in the record. The clerk says that a demurrer was filed to it, but for what cause we do not know, as the demurrer is not in the transcript, and we will therefore presume that the first paragraph of the answer was a good defence to the action. The judgment cannot, therefore, be reversed; but we will go further, as we think there is no merit in this appeal. It is said that a motion to strike out certain paragraphs of the answer was made and sustained, but this motion is not in the record; and it is further said that this ruling was excepted to, and a bill of exceptions filed, but no such bill is in the transcript. If it were necessary for the determination as to whether the judgment should be reversed or affirmed, we should hold that all these paragraphs of the answer are in the record, but it is not. The clerk says there was a motion to dismiss the case, and a bill of exceptions filed for overruling the

motion, but neither the motion nor bill of exceptions is in the record.

There was a trial by jury and verdict for the defendant (appellee), motion for a new trial, for the causes, "1st. Said verdict is contrary to law. 2d. Said verdict is not supported by sufficient evidence. 3d. There was a misdirection of the court, as to the law, to the jury by the court in this cause, and excepted to at the time. 4th. For the introduction of improper evidence to the jury, and objected to at the time."

The only legal or proper assignment of error is the overruling of the motion for a new trial.

As to the first and second causes for a new trial, we have only to say, that we know of no law contravened by it, and that the evidence not only justified, but absolutely required it. As to the third and fourth, we hold, as this court has done in numerous cases, published and unpublished, that they are not sufficient causes for a new trial, because the one does not point out in what particular the court misdirected the jury, and in the other, what evidence was improperly introduced to the jury and objected to at the time.

We shall not re-write the often repeated reasons for this ruling.

The judgment is clearly right, and is affirmed, at the costs of the appellant.

C. Wright, A. Major, and S. Major, for appellant.

FARMAN v. RATCLIFF ET AL.

PRACTICE.—*Appeal.—Superior Court.—Assignment of Error.*—On appeal from the Superior Court to the Supreme Court, the error should be assigned upon the action of the court in general term.

APPEAL from the Marion Superior Court.

DOWNEY, J.—This was an action by the appellant against

Herod *et al.* v. The Duck Pond Ditching Association.

the appellees. After issues formed there was a trial by the court, finding for the defendants, motion for a new trial overruled, and judgment for the defendants. An appeal was taken from the special to the general term, where it was assigned that certain errors had been committed by the court in special term. The court in general term affirmed the judgment of the special term. From this judgment of affirmance the present appeal is taken, and it is now assigned as error, that "the court erred in overruling the plaintiff's motion for a new trial." According to the opinion of this court, in *Wesley v. Milford*, 41 Ind. 413, this assignment presents no question for the decision of this court. The trial took place in special term, and the motion for a new trial was then made and overruled. Appeals from the superior court to this court can only be taken from the judgment of that court in general term, and the errors must be assigned upon the action of the general term. See, also, *Carney v. Street*, 41 Ind. 396.

The judgment is affirmed, with costs.

J. S. Harvey, for appellant.

A. T. Beck and B. H. Cale, for appellees.

HEROD ET AL. v. THE DUCK POND DITCHING ASSOCIATION.

APPEAL from the Hendricks Common Pleas.

OSBORN, C. J.—This case is in all respects similar to *Dobson v. The Duck Pond Ditching Association*, ante, p. 312. Under the ruling in that case, the judgment of the court below is affirmed.

The judgment of the said Hendricks Common Pleas is affirmed, with costs.

C. C. Nave and C. A. Nave, for appellants.

L. M. Campbell, for appellee.

The Indianapolis, Cincinnati, and Lafayette R. R. Co. v. Bonnell.

THE INDIANAPOLIS, CINCINNATI, AND LAFAYETTE RAILROAD
COMPANY v. BONNELL.

RAILROAD.—*Injury to Animals.—Fencing.*—In an action, under the statute, against a railroad company to recover the value of a cow killed by a locomotive, it appeared in evidence that the animal was struck at a place on the railroad forty-three feet from the center of a public turnpike, which was legally sixty-six feet wide, said place not being fenced in, but being in an open space between a cattle-guard and the crossing of the railroad and turnpike.

Held, that the railroad company was liable under the statute, the railroad not being fenced according to law.

APPEAL from the Boone Common Pleas.

BUSKIRK, J.—This was an action by the appellee, under the statute, against the appellant, to recover the value of a cow which was killed by the locomotive and cars of appellant, at a point where the road might have been, but was not, securely fenced.

There was issue, trial by jury, and verdict for plaintiff. A motion for a new trial was overruled, and judgment was rendered on the verdict.

The error assigned is the overruling of the motion for a new trial. The evidence is in the record. The killing of the cow is conceded, and her value is admitted. The only controverted question of fact is as to where the cow was when she was struck by the engine. It was claimed below and is claimed here, that she was struck on the crossing of the railroad and Indianapolis turnpike road. The appellee insisted that she was struck in an open space between the gravel road and cattle-guards. Four witnesses testified from certain marks, signs, tracks, and indications, which they gave to the jury, that, in their opinion, the cow was struck outside of the turnpike road; while one witness, who was present and saw the engine strike the cow, testified that she was caught within five or six feet of the center of the travelled track of the pike, right at the crossing of the railroad.

The Indianapolis, Cincinnati, and Lafayette R. R. Co. v. Bonnell.

We are very strongly impressed with the belief that the jury were far more competent to place the proper estimate upon the "marks, signs, tracks, and indications" detailed by the witnesses than we are. The jury evidently permitted them to outweigh the positive testimony of the one witness who testified positively to the facts.

Besides, conceding that the cow was struck at the point claimed by appellant, we are unable to see how that would relieve the railroad company from liability. It was shown by the evidence that the railroad runs from the north-west to the south-east, and the state road, or Indianapolis pike, runs generally in the same course, but more in a north and south direction, so that the dirt or pike road crosses the railroad from the north a little east of south; that the dirt or pike road was legally sixty-six feet wide, while the space between the cattle-guards was one hundred and seventy feet; and that there was an open space south of the crossing where there is no fence, and one north and east of the pike road formerly worked as a gravel pit. One witness testified, that "the sign" indicated that the train was going east at the time the cow was struck; and that there were "tracks" showing that she had left the pike in going south toward the railroad until she had gotten within about forty feet of the railroad, and there left the pike east on open space north of the railroad and entered on the railroad about forty-three feet from center of gravel bed where the pike crosses the railroad.

We do not think that a railroad can be regarded as securely fenced where the cattle-guards are placed so far apart as to leave an open space on both sides. Such cattle-guards could be of little use. See *The Jeffersonville, etc., Railroad Co. v. Morgan*, 38 Ind. 190.

We can not disturb the judgment.

The judgment below is affirmed, with costs.

A. J. Boone and *R. W. Harrison*, for appellant.

O. S. Hamilton, for appellee.

THE STATE v. LEUNIG.

JURY.—Discharge of.—Misconduct.—Jeopardy.—A jury, which had been impanelled and sworn to try an indictment for murder, having heard the evidence and having retired in charge of a bailiff to deliberate upon their verdict, and having returned into court, it was shown to the court that during the adjournment of the court and after the commencement of the trial, the bailiff, in disobedience of the order of the court, instead of taking the jury to a room, took them into the public square, and left them, and went to the saloon of the defendant, who was out on bail, and there procured from his barkeeper a can of beer, and gave it to the jury, who drank it, and that the bailiff so gave them said beer without the knowledge or consent of the court. Thereupon the court, over the defendant's objection, discharged the jury.

Held, that the discharge of the jury was not necessary.

Held, also, that having so discharged the jury, there was no error in then discharging the defendant.

APPEAL from the Vanderburg Criminal Circuit Court.

OSBORN, C. J.—The only question in this case is the correctness of the ruling of the court in discharging the appellee. He was indicted for murder. After a plea of not guilty, a jury was impanelled and sworn to try the issue. The record then recites: "and after hearing the evidence, the jury were placed in the custody of two bailiffs, duly sworn and instructed by the court to be by them kept and placed in one or more rooms for lodging, and not to be permitted to communicate with other parties, and return into court to-morrow morning at eight o'clock." The record further shows that on the next day the parties and jury appeared, "and it appearing to the satisfaction of the court by due proof, that during the adjournment of the court, since the commencement of this trial of this cause, the bailiff having charge of the jury, in disobedience of the order of the court, instead of taking said jury to a room, took them into the public square and left them and went to the grocery or saloon of the defendant, who was out on bail, and there procured from his barkeeper a can or pitcher of beer and gave it to the jury, who drank it, and that said bailiff of said jury did, without the knowledge or consent of said court,

The State v. Leunig.

give to said jury, during the adjournment of said court, said beer to be by them drunk. It is therefore considered and ordered that it is necessary for the ends of justice that said jury be discharged from the further hearing or trial of said cause." The order was made over the objection of the appellee. Afterward the appellee was discharged from further prosecution on the ground that he had been in jeopardy.

The State seeks to reverse the judgment on the ground that the judge discharging the jury was the exclusive judge of the necessity, and that the court had authority to discharge them whenever in the opinion of the judge the ends of justice would otherwise be defeated.

There is some conflict in the decisions of courts as to when the discharge of a jury will entitle a defendant to a discharge on the ground of jeopardy. In *The State v. Nelson*, 26 Ind. 366, it was held that after the discharge of a jury, because of their inability to agree upon a verdict, the defendant had not been in jeopardy. That case held that the court should judge whether the jury could conscientiously agree upon a verdict. If it appeared plain to the court that they could not, their discharge would not operate as an acquittal of the defendant. In some of the prior cases it had been intimated, if not held, that the necessity which produced the discharge of the jury must be a physical one. In that case it was said, that it did not follow that the defendant might not avail himself of any abuse of discretion by the judge in discharging the jury without cause; that the circumstances might be made a matter of record, and unless a proper case should be shown to justify the action of the court, the discharge would be equivalent to a verdict in favor of the defendant. The jury had been out seventy-two hours, and the court held it not an abuse of discretion to discharge them.

The mere ruling or finding of the court that the ends of justice require the discharge of a jury will not, of itself, be sufficient to establish a necessity for their discharge, espe-

Jones et al. v. Frost.

cially when the facts in the record show that no such necessity existed. The judge might find that the ends of justice required the discharge of the jury and a continuance of the cause, in order that absent witnesses might be procured, or for any other cause, when, in fact, there was no necessity for it.

We do not think it necessary in this case to reopen or discuss the question as to when and under what circumstances a jury may be discharged without its being equivalent to a verdict of not guilty. We are satisfied that in the case at bar there was no necessity for discharging them, and that the court committed no error in ordering the discharge of the appellee.

The judgment is affirmed.

J. C. Denny, Attorney General, *W. P. Hargrave*, *J. & H. C. Pitcher*, and *J. H. Laird*, for the State.

W. F. Parrett, *L. Wood*, *E. M. Spencer*, and *W. Loudon*, for appellee.

JONES ET AL. v. FROST.

APPEAL from the Lawrence Circuit Court.

PETTIT, J.—The papers purporting to be a transcript have not the seal of the court below to them, and we can not, therefore, act upon them, in the case they attempt to present to us.

One court cannot speak officially to any other court, otherwise than by its seal.

The appeal is dismissed, with costs.

A. B. Carlton and *J. H. Swaar*, for appellants.

F. Wilson and *A. C. Voris*, for appellee.

MILLER v. THE STATE.

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PRACTICE.—Criminal Law.—Continuance.—Affidavit.—Diligence.—A person was indicted in June, and an application was made in September of the next year for a continuance of the case on the ground that a material witness was absent, and the statement in the defendant's affidavit as to the residence of the witness and the diligence used to obtain his testimony was as follows: "That he believes the said witness resides in Miami county, Indiana; that he caused a subpoena to be issued and placed in the hands of a special messenger, who, under the order of this court, made an effort to serve the summons, but said summons has been returned not found;" it not being stated when the subpoena was issued, and it not appearing when the defendant was arrested.

Held, that the affidavit was not sufficient to entitle the defendant to a continuance.

APPEAL from the Grant Circuit Court.

OSBORN, C. J.—The appellant was indicted for grand larceny, tried by a jury, and convicted, and, over a motion for a new trial, sentenced to be imprisoned in the state prison for three years, to pay a fine of five dollars, and be disfranchised for five years.

The only ground for a new trial was the refusal of the court to grant a continuance on his motion and affidavit, and the only error assigned is in overruling the motion for a new trial.

The continuance was asked on account of the absence of a witness. The facts, which the appellant in his affidavit stated the absent witness would testify to, were material, and tended to show his innocence of the crime charged against him in the indictment. The question, we think, is, whether he showed sufficient diligence to ascertain the residence of the witness and to obtain his testimony.

The indictment was found by the grand jury in June, 1872. It is not stated in the affidavit, nor does it otherwise appear when he was arrested. The affidavit for continuance was made on the 17th of September, 1873. The statement as to the residence of the witness and the diligence used to obtain his testimony is as follows: "That he believes the said witness resides in Miami county, Indiana; that he

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caused a subpoena to be issued and placed in the hands of a special messenger, who under the order of this court made an effort to serve the summons, but said summons has been returned not found." That is not sufficient. It is not stated when the subpoena was issued. The residence of the witness may have been known to the appellant all the time, and the issuing of the subpoena negligently postponed until the day before the cause was called for trial, and the failure of the officer to find the witness caused by his temporary absence, or for the want of reasonable time to make search for him. Although the provisions of the civil code do not necessarily govern in criminal practice, it has been held that it is reasonable to consult them in the absence of special provisions in the criminal code, in establishing rules, as the court must, in relation to procedure in criminal cases. *Wheeler v. The State*, 8 Ind. 113; *McLaughlin v. The State*, 8 Ind. 281.

We think that when a defendant in a criminal case asks a continuance on account of an absent witness, reasonable diligence to obtain the witness, or an excuse therefor, must be shown, or the application should be refused. The fact that a subpoena was issued and placed in the hands of an officer for service, without showing when it was done, does not show reasonable diligence. The party delays at his peril.

The judgment of the said Grant Circuit Court is affirmed, with costs.

A. Steele and *R. T. St. John*, for appellant.

J. C. Denny, Attorney General, for the State.

James v. McConnell.

JAMES v. McCONNELL.

PRACTICE.—*Bill of Exceptions.—Time of Filing.*—Where time is given within which to file a bill of exceptions, and it does not appear that a paper purporting to be a bill of exceptions was filed within the time, it will not be regarded as in the record.

APPEAL from the Clay Common Pleas.

DOWNEY, J.—This was an action by the appellee against the appellant, who is a physician, for malpractice in his profession. She alleges that she was sick, that she employed the defendant to treat her, for a compensation to be paid, and that from his unskilful and negligent treatment of her she became salivated, resulting in great and permanent injury to her. After issues formed, there was a trial by jury, and a verdict for the plaintiff. A motion for a new trial was made by the defendant, which was overruled, he excepted, and final judgment was rendered against him. Sixty days were given him in which to file bills of exceptions. There are four bills of exceptions in the record. But it does not appear that any of them were filed within the time limited. They can not, therefore, be regarded as properly in the record. *The Louisville, etc., Railroad Co. v. Lafland*, 38 Ind. 55.

The questions argued are as to the sufficiency of the evidence, as to instructions given, and as to others refused. The questions are none of them so presented by the record as to enable us to decide them.

The judgment is affirmed, with costs.

A. T. Rose and F. F. Stephenson, for appellant.

W. W. Carter and S. D. Coffey, for appellee.

GROESCH v. THE STATE.

STATUTES.—Validity.—An act of the legislature, duly passed and approved by the Governor, is not to be declared invalid, unless it be clearly, palpably, and plainly in conflict with the constitution.

CONSTITUTIONAL LAW.—LIQUOR LAW.—The act of February 27th, 1873, to regulate the sale of intoxicating liquors (Acts 1873, p. 151), does not violate the provisions of section one of article four of the constitution, by committing legislative power to the people.

SAME.—Neither does said act violate the provisions of the constitution by vesting administrative power in the people.

SAME.—Nor does it violate the provisions of the constitution prohibiting the enactment of laws local in their nature.

SAME.—Uniform Operation of Laws.—The constitution does not require that the operation of laws throughout the State shall be uniform, in any other sense than that their operation shall be the same in all parts of the State, under the same circumstances and conditions.

APPEAL from the Marion Criminal Court.

DOWNEY, J.—This is an indictment against the appellant, in which he is charged with selling intoxicating liquor, and suffering the same to be drunk in the building and upon the premises where the same was sold, without a permit, in violation of the act of February 27th, 1873, entitled “an act to regulate the sale of intoxicating liquors, to provide against evils resulting from any sale thereof, to furnish remedies for damages suffered by any person in consequence of such sale, prescribing penalties, to repeal all laws contravening the provisions of this act, and declaring an emergency.” Acts 1873, p. 151, *et seq.*

The defendant moved the court to quash the indictment, and his motion was overruled. He then upon arraignment pleaded not guilty, and the issue having been tried by the court, without a jury, he was found guilty, and a fine of ten dollars assessed against him. Motions made by him for a new trial, and in arrest of judgment, were overruled, and final judgment was rendered against him. Exceptions were duly taken by him to the several rulings of the court, and he has here assigned these rulings as errors. The avowed object

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of the appeal is to obtain the judgment of this court upon the constitutionality of the act on which the indictment is founded. It is not denied by counsel for the appellant that the facts alleged in the indictment were fully proved by the evidence on the trial of the cause, and counsel for the State concede that the record is such as fairly presents to this court the questions, a decision of which is desired. The questions involved have been argued, both orally and in printed briefs, by the distinguished counsel engaged in the cause. The objections made by counsel for the appellant do not extend to the whole act, but are confined to certain features or parts of it. In the language of their brief, "the only portions of the act that are necessarily brought to the attention of the court by this record are those prohibiting such sales without a permit and those relating to the granting of permits."

Having bestowed upon the questions presented the consideration which their magnitude and importance demand, we proceed to state our conclusions with some of the reasons which have led us to such conclusions.

The law in question is, in many essential particulars, very different from any other law on the subject, which has heretofore been in force in the State. It contains many important provisions which have not before been found in any law in this State on that subject. For this reason, and in order that our decision and the law may be found together, we will state a little more fully than we otherwise would do, the provisions of the act. It will thus more readily be seen what features or parts of the act have been passed upon by this decision and what have not been considered. The first section of the act provides, "that it shall be unlawful for any person or persons, by himself or agent, to sell, barter, or give away for any purpose of gain, to any person whomsoever, any intoxicating liquors to be drunk in, upon, or about the building or premises where the liquor is sold, bartered, or given away, or in any room, building, or premises adjoining to or connected with the place where the liquor

is sold, bartered, or given away for the purpose of gain, until such person or persons shall have obtained a permit therefor from the board of commissioners of the county where he resides, as hereinafter provided."

The second section requires that "any person desiring a permit to sell intoxicating liquors to be drunk on the premises, shall file in the office of the auditor of the proper county, not less than twenty days before the first day of the term of any regular session of the board of commissioners of such county, a petition in writing, stating therein the building or number, street, ward or township wherein the permission is asked to be granted, praying for such permit, and certifying that the applicant is a resident voter of such county, and a citizen of the State of Indiana, and that he is a proper person to have and receive such permit; which petition shall be signed by the applicant, and also by a majority of the legal voters resident in the ward, if it be in a city or town, if it be an incorporated town, or township wherein the applicant proposes to sell intoxicating liquors; such petition shall be kept on file by the auditor until the next ensuing regular session of the board of commissioners, when it shall be presented to the board for their action. The board shall examine such petition, and if satisfied the same is in proper form, and that it has been signed as hereinbefore required, shall direct a permit to be issued under the hand and seal of said auditor, and delivered to the person named in such permit, upon his complying with the provisions of this act and paying the costs of filing and recording said petition and costs of issuing said permit."

By the third section it is required that "before the granting of a permit by the board of commissioners, the applicant shall cause to be executed and properly acknowledged before an officer authorized to take acknowledgment of deeds, a bond payable to the State of Indiana, in the sum of three thousand dollars, with good freehold security thereon of not less than two persons, to be approved by the board of commissioners, and conditioned for the payment of any

and all fines, penalties and forfeitures incurred by reason of the violation of any of the provisions of this act, and conditioned further, that the principal and sureties therein named shall be jointly and severally liable, and shall pay to any person or persons, any and all damages which shall in any manner be suffered by or inflicted upon any such person or persons, either in person or property, or means of support, by reason of any sale or sales of intoxicating liquors to any person, by the person receiving such permit or by any of his agents or employees. Separate suits may be brought on said bond by the person or persons injured, but the aggregate amount recovered thereon shall not exceed the said sum of three thousand dollars, and in case the amount of said bond shall be exhausted by recoveries thereon, a new bond in the same penalty and with like sureties shall be filed within ten days, and in default thereof said permit shall be deemed to be revoked. Such bond, after its approval by the board of commissioners, shall be filed in the office of the auditor of the county, and shall be recorded by such auditor forthwith in a book prepared for that purpose, and shall there remain for the use of the State of Indiana, and for the use of any person or persons suffering any damage as hereinbefore set forth. Such bond may be sued and recovered upon in any court having civil jurisdiction in the county (except justices' courts) by or for the use of any person or persons, or their legal representatives, who may be injured or damaged by reason of any sale or sales of intoxicating liquors by the person receiving the permit or by any of his agents or employees. The record of the bond or a copy thereof, duly certified by such auditor, shall be admissible in evidence in any suit on such bond, and shall have the same force and effect as the original bond would have if offered in evidence."

The fourth section declares, that "the whole number of votes cast for candidates for Congress at the last preceding congressional election in the township, and the whole number of votes cast for councilman or trustee in any ward or town, at the last

preceding municipal election in any city or town in which the applicant for permit desires to sell said intoxicating liquors, shall be deemed to be the whole number of legal voters of such ward, town or township, a majority of whose names shall be signed to the petition of such applicant;" and this section also provides a punishment for any person not a legal voter of the ward, town, or township, who may sign such petition.

By the fifth section it is provided, that the permit shall be granted for one year; that the auditor shall furnish to the party to whom it has been granted a copy of the order, which shall show the date of the commencement and the expiration thereof. This copy is required, by this section, to be hung up in a conspicuous place in the room, where the liquors are sold, where it can be seen and read, at all times, by any person desiring to do so. This section also provides, that, should any person holding a permit be convicted of a violation of any of the provisions of the act, such conviction shall work a forfeiture of his permit, and of all rights thereunder, and that no permit shall thereafter be granted to such person, before the expiration of five years from the date of such conviction.

The sixth section denounces a penalty against any person who, by himself or agent, shall sell, barter, or give intoxicating liquors to any minor, or to any person intoxicated, or to any person who is in the habit of getting intoxicated.

All places where intoxicating liquor is sold, in violation of the act, are, by the seventh section, to be taken, held, and are declared to be common nuisances; and all rooms, taverns, eating houses, bazaars, restaurants, drug stores, groceries, coffee houses, cellars, or other places of public resort, where intoxicating liquors are sold in violation of this act, shall be shut up and abated as public nuisances, upon the conviction of the keeper thereof, who is to be punished as afterward provided in the act.

In the eighth section it is enacted that any person who shall, by the sale of intoxicating liquors, with or without a permit, cause the intoxication, in whole or in part, of any other

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person, shall be liable for, and be compelled to pay, a reasonable compensation to any person who may take charge of and provide for such intoxicated person, for every day he or she is so cared for, which sum may be recovered in an action of debt before any court having competent jurisdiction.

The ninth section punishes those who are found in a state of intoxication, and requires them to give information as to the person or persons from whom the liquor, in whole or in part, was obtained, under penalty of imprisonment in the county jail.

According to the tenth section, a permit does not authorize selling on Sunday, upon the day of any state, county, township, or municipal election in the township, town, or city, where the election may be held, upon Christmas day, upon the Fourth of July, upon any Thanksgiving day, or upon any public holiday, or between the hours of nine o'clock P. M., and six o'clock, A. M.; and to sell in violation of this section is made penal.

The eleventh section declares, that "the bartering or giving away of intoxicating liquors, or other shift or device to evade the provisions of this act, by any person or persons keeping liquors for sale, or by his agent or employee, at the place where the same are kept for sale, shall be deemed and held to be an unlawful selling or giving away for the purpose of gain within the provisions of the act."

The twelfth section gives, in addition to the remedy given by section eight, to every husband, wife, child, parent, guardian, employer, or other person, who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual, or otherwise, of any person, a right of action in his or her own name, severally or jointly against any person or persons who shall, by selling, bartering, or giving intoxicating liquors, have caused the intoxication, in whole or in part, of such person, and declares that any person or persons owning, renting, leasing, or permitting the occupation of any building or premises, and having knowledge that intoxicating

liquor is to be sold therein, or having leased the same for other purposes shall knowingly permit therein the sale of intoxicating liquor, or who, having been informed that intoxicating liquor is sold therein, that has caused, in whole or in part, the intoxication of any person, who shall not immediately, after being so informed, take legal steps in good faith to dispossess such tenant or lessee, shall be liable jointly with the person selling, bartering, or giving away intoxicating liquors as aforesaid, to any person or persons injured, for all damages, and for exemplary damages.' It is provided, however, that execution on any such judgment shall first be levied on the property of the person selling, etc., such liquors. By this section a married woman has the same right to bring suit, and to control the same and the amount recovered, as a *feme sole*, and all damages recovered by a minor are to be paid to the minor or to his or her parent, guardian, or next friend, as the court may direct. The unlawful sale, etc., of liquor by a tenant works a forfeiture of all his rights under the lease or contract by which the premises are held.

This section also declares that all suits for damages under the act may be by any appropriate action in any of the courts in this State having competent jurisdiction, and declares that all judgments recovered under the provisions of the act may be enforced without any relief from valuation laws.

Section thirteen gives the right of action to the township trustee under certain circumstances.

The fourteenth section, which is the section on which the indictment in this case is founded, declares, that "for every violation of the provisions of the first and sixth sections of the act, the person so offending shall forfeit and pay a fine of not less than ten dollars nor more than fifty dollars, or be imprisoned in the jail of the county not less than ten nor more than thirty days;" and for every violation of the seventh section, a fine of not less than twenty nor more than fifty dollars, and the place so kept shall be shut up and abated as a common nuisance, by order of the court before which

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the conviction is had. The fifteenth, sixteenth, eighteenth, and nineteenth sections of the act relate to proceedings under the act, and the force and effect of the judgment rendered. The seventeenth section enacts, that it shall be unlawful for any person to buy for or furnish to any person who is at the time intoxicated, or in the habit of getting intoxicated, or to buy for or furnish to any minor, to be drunk by such minor, any intoxicating liquor, and declares that any person or persons violating that section of the act shall be fined not less than five nor more than fifty dollars. The twentieth section repeals all laws and parts of laws conflicting with this act or with any of its provisions, etc. The twenty-first section of the act declares that an emergency exists for the immediate taking effect of the act, and that it shall, therefore, be in force from and after its passage, except in so far as it relates to those who hold a license under the existing laws of the State, and as to them immediately after the expiration thereof.

The question as to the constitutionality or the unconstitutionality of an act of the legislature, when presented to the court, is always regarded as one of great delicacy and importance. This results from a consideration of the deference due to the other departments of the government, and from the fact that in those cases where the question is as to the conflict of the law with the state constitution, as is the case here, the decision of the court is final. Members of the general assembly are solemnly sworn to support the constitution of the State, and it is their imperative duty to pass no law which, in any of its parts, contravenes its provisions. When an act has secured the requisite votes and has passed the two houses of the general assembly, it must undergo the scrutiny of the executive, who is equally with the legislature bound to forbid its becoming a law, if, in his opinion, it is in violation of the constitution of the State. Hence, it has always been the language of this court, that an act of the legislature, duly passed and approved by the governor, is not

to be declared invalid, unless it be clearly, palpably, and plainly in conflict with the constitution. *The Lafayette, etc., Railroad Co. v. Geiger*, 34 Ind. 185, and cases cited. We need not stop to refer to other authorities on this point, but we cannot resist the inclination to repeat, in this connection, the appropriate language of one whose talents and labors have been an honor to the bench of this court: "The constitution is paramount to any statute, and whenever the two are in conflict the latter must be held void. But where it is not clear that such conflict exists, the court must not undertake to annul the statute. This rule is well settled, and it is founded in unquestionable wisdom. The apprehension sometimes, though rarely, expressed, that this rule is vicious, and constantly tends towards the destruction of popular liberty, by gradually destroying the constitutional limitations of legislative power, results from a failure to comprehend the character of our forms of government, and the fundamental basis upon which they rest. The legislature is peculiarly under the control of the popular will. It is liable to be changed, at short intervals, by elections. Its errors can, therefore, be quickly cured. The courts are more remote from the reach of the people. If we by following our doubts, in the absence of clear convictions, shall abridge the just authority of the legislature, there is no remedy for six years. Thus, to whatever extent this court might err, in denying the rightful authority of the law-making department, we would chain that authority, for a long period, at our feet. It is better and safer, therefore, that the judiciary, if err it must, should not err in that direction. If either department of the government may slightly overstep the limits of its constitutional powers, it should be that one whose official life shall soonest end. It has the least motive to usurp power not given, and the people can sooner relieve themselves of its mistakes. Herein is a sufficient reason that the courts should never strike down a statute, unless its conflict with the constitution is clear. Then, too, the judiciary ought to accord to the legis-

islature as much purity of purpose as it would claim for itself, as honest a desire to obey the constitution, and, also, a high capacity to judge of its meaning. Hence, its action is entitled to a respect which should beget caution in attempting to set it aside. This, with that corresponding caution of the legislature, in the exercise of doubtful powers, which the oath of office naturally excites in conscientious men, would render the judicial sentence of nullity upon legislative action as rare a thing as it ought to be, and secure that harmonious co-operation of the two departments, and that independence of both, which are essential to good government." FRAZER, J., in *Brown v. Buzan*, 24 Ind. 194.

With the expediency of the law, if there is any question as to that, we have nothing to do. That is a question first for the legislator, and next for the executive. That consideration may control the vote of the former, or the veto or approval of the latter, but we can decide nothing with reference to it. Our duty is to decide whether or not there is a plain violation of the constitution by the features or portions of the act in question. From the discharge of this duty we have no disposition to shrink.

Counsel for appellant say: "The propositions that we desire to submit to the judgment of the court are these: that this act provides for a direct intervention of the people in the making and in the executing of a law; that the taking effect of the act is made to depend upon popular choice; that it is local and special, when it should be general and uniform in operation; and that it therefore violates all those several provisions of the constitution, in which the organic ideas upon these subjects are embodied." The first question to be decided is this, does the act in question commit legislative power to the people? It is urged by counsel for the appellant that it does, and that it is therefore in violation of section one of article four of the constitution, which provides, that the legislative authority of the State shall be vested in the general assembly, which shall consist of a sen-

ate and house of representatives. It is quite clear, we think, as a legal proposition, that the legislative authority is incapable of delegation; that it cannot be conferred by the legislature upon any other body, or upon any person or persons, is a proposition not questioned. *Barto v. Himrod*, 4 Seld. 483; *Parker v. Commonwealth*, 6 Pa. St. 507; *Thorne v. Cramer*, 15 Barb. 112; *Bradley v. Baxter*, 15 Barb. 122; *Rice Foster*, 4 Harring. Del. 479; *Geebrick v. The State*, 5 Iowa, 491; *The State v. Weir*, 33 Iowa, 134. Yet it would, perhaps, not be seriously disputed that the legislature may confer, and in fact has conferred, an authority, which if not legislative much resembles legislative authority, upon municipal corporations, for purposes of local self-government. *The People v. Collins*, 3 Mich. 343; 1 G. & H. 223, sec. 35; *Brinkmeyer v. The City of Evansville*, 29 Ind. 187; *The Mayor, etc., v. Roberts*, 34 Ind. 471. The material question here is, does the act in question confer upon the people or a portion of the people legislative authority? The ground taken is, that the law is not in force in any township, town, or ward of a city, until the requisite number of voters have signed a petition, and that it is the act of such voters in signing the petition which makes the law. In our judgment, this position is untenable. We cannot regard the act as conferring upon the petitioners legislative authority in any sense of these terms. It might as well be said that the law which authorizes the laying out of a public highway by authority of the county commissioners, upon the petition of a designated number of persons, was unconstitutional, because it conferred upon such petitioners legislative authority. Had the question been submitted to the people to determine, by vote or by petition, whether the law should take effect or not, or the time when it should take effect, as in some of the cases to which we have referred, there would have been some ground for the objection. But here the law was enacted in the usual form of enacting laws, and it is declared by the legislature that it shall be in force from and after its passage, etc. The petition of an applicant for a permit, aided by his co-petition-

ers, so far from being an exercise of legislative authority, really assumes that the law has been enacted and is already in force, or otherwise there would be no authority for such application and petition. The case of *Maize v. The State*, 4 Ind. 342, is cited as an authority in support of all the objections urged against this law. We do not so regard it. In our opinion, the act, the constitutionality of which was in question in that case, was so different from the act now in question, that that case is not an authority upon any point in this case. Therefore, while we need not approve the decision in that case, it is not necessary that we should overrule it in deciding this case. It may be remarked, however, that there are several cases, and among them *Clarke v. The City of Rochester*, 24 Barb. 446, and 28 N. Y. 605, the case in the Supreme Court of Pennsylvania of *Loch*, Chicago Legal News, vol. 5, p. 372, *Bancroft v. Dumas* 21 Vt. 456, and the more recent case of *The State, ex rel. Sanford, v. The Morris Common Pleas*, in the Supreme Court of New Jersey, 12 Am. Law Reg. 32, where legislation similar to the statute of 1853, which was in question in the Maize case, has been held to be constitutional and valid. Under the law in question in the Maize case, the voters in each township determined the question whether any licenses should be granted or not, by a vote, once in each year. When the vote was in favor of license, any one could obtain a license by filing a bond with security as required by the act. If the vote was against license, no one could obtain a license during the year. The question as to the qualifications or fitness of the applicant to be intrusted with a license did not enter into consideration in any view of the case.

Under the present law, however, the vote at a preceding election is assumed as fixing the number of voters, without any reference to the fact that all the voters never vote at the same election, and a number equal to a majority of that number must petition for the granting of each permit. Thus the qualifications and fitness of each person, as well as the wish of the petitioners for the establishment of the busi-

ness in their neighborhood, are at once settled by the voice of those who are most intimately concerned. If they do not thus open the door to the traffic, the law provides that, so far as that applicant is concerned, it shall remain closed. This is a species of self-government which by the law is placed in the hands of the people to be exercised by a majority of them according as they may judge to be for their best interest. It is believed that the privilege of retailing intoxicating liquors has never, under any law which has ever been enacted in the State, been granted unconditionally. That the applicant should comply with certain conditions, such as the presentation of a petition signed by a designated number of persons, make proof of his fitness to have a license, or execute a bond, etc., has been a feature of every law which has ever been in force in this State. To comply with such condition has not been heretofore supposed to be an exercise of legislative authority.

The next objection to the act is, that it vests administrative power in the people. This position is in conflict with the preceding, for the same act can not be legislative and at the same time administrative in its character, nor can any person charged with official duties of the one class exercise any of the duties of a person of the other class, except as expressly provided in the constitution. The administrative is included in the executive department of the government. Art. 3, sec. 1. Looking at the sixth article of the constitution, which relates to administrative officers and their functions, we find that it embraces the secretary, auditor, and treasurer of State, and certain county and township officers. It also provides the term during which such officers shall hold, their place of residence, etc. The last section states that the general assembly may confer upon the board doing county business in the several counties powers of a local administrative character. We are unable to see any ground upon which it can be maintained that the act by which the petitioners, who recommend the applicant and ask that a permit may be granted to him, can be regarded as an admin-

istrative act. So far as the board of commissioners of the county is authorized by the act to hear and decide the questions which may arise upon the presentation of the petition, there can be no question, we think, as to their power to do so, since the constitution expressly authorizes the legislature to confer such powers upon them.

The third and last objection to the act is, that it is local and not general in its operation. This objection goes to the form and quality of the law, irrespective of the manner of its enactment. The following provisions of the constitution are cited as those which are violated by this law: the portion of sec. twenty-two of article four which reads as follows: "The general assembly shall not pass local or special laws, in any of the following enumerated cases; that is to say, * * * for the punishment of crimes and misdemeanors;" also section twenty-three of the same article, which reads as follows: "In all the cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State." Is the act in question, or the parts or features thereof which are in question, general and of uniform operation throughout the State? We think the act is general. It is in force and operation in all parts of the State. It is only in a qualified sense that any law can be said to be of uniform operation throughout the State. A law for the punishment of crime, the provisions of which are alike applicable to all parts of the State, must necessarily lack uniformity in one sense in its operation, not only as to persons but also as to localities. It operates in those places where its provisions are violated and upon those persons who transgress them. Under the same circumstance and conditions its operation is uniform. The law which affords civil remedies is uniform in its provisions, and under the like circumstances is uniform in its operation throughout the State. It is not required that every man shall resort to that remedy, or that in each locality there shall be the same number or any number of persons who

shall resort to the remedy, in order to make the law uniform in its operation in the sense in which the terms are used in the constitution. Such is the case under all circumstances when one or more persons are by law required to do some act or acts, upon or in consequence of which the law is to operate. *Smith v. Doggett*, 14 Ind. 442. It cannot be held that the framers of the constitution intended that the operation of laws throughout the State should be uniform in any other sense than that their operation should be the same in all parts of the State under the same circumstances and conditions. In the case of *Maize v. The State*, *supra*, the court having come to the conclusion that it was the vote of the people which made the law, and seeing that in one township the vote would be for license, and in another it would be against license, very naturally, whether rightfully or not, came to the conclusion that the law would thus be in force in some townships and not in others, and therefore local and special in its character and in violation of the constitution. That state of things can never exist under the present law. It is true that if no man will apply for a permit in any township, town, or ward, or if some one is disposed to apply and he cannot command the necessary number of vouchers to sign his petition, there can be no shop in that locality, while at the same time there may be in an adjoining township, town, or ward one or many of such establishments. So, too, there may be what some may regard as a want of uniformity in the same township, town, or ward. A. may, on account of his supposed superior fitness for the business, the location of his place of business, or for some other reason, readily obtain the required indorsement, while B., C., and D., for the lack of the supposed qualifications, advantage of location, or other reasons, may be wholly unable to comply with the act in this respect. One man may be able to give the bond and securities required by the act, while another or others may be wholly unable to do so. Does this destroy the uniformity of operation of the act in either

Hendricks et al. v. The Indianapolis and Shelbyville Gravel Road Co.

of the cases supposed? We think it does not. It would not be difficult to refer to statutes which in principle can not be readily distinguished from the law in question in this case. Many of them are mentioned in the brief of counsel for the appellee. But we will not extend this opinion by a reference to them. In our opinion, the law is not justly liable to any of the objections urged against it.

The judgment is affirmed, with costs.

J. E. McDonald, J. M. Butler, O. B. Hord, and A. W. Hendricks, for appellant.

J. W. Gordon, A. G. Porter, and J. C. Denny, Attorney General, for the State.

HENDRICKS ET AL. *v.* THE INDIANAPOLIS AND SHELBYVILLE
GRAVEL ROAD CO.

TURNPIKE.—*Assessment.—Injunction.*—*Hopkins v. The Greensburg, Kingston, and Clarksburg Turnpike Co.*, 40 Ind. 44, adhered to.

APPEAL from the Marion Common Pleas.

BUSKIRK, J.—This suit was brought by the appellants against the appellee, to enjoin the collection of assessments against the property of appellants, for the construction of a gravel road.

The injunction was asked upon the ground that the assessors had failed to view and list all the lands within the bounds prescribed by the act of March 11th, 1867.

An answer consisting of five paragraphs was filed. A demurrer was sustained to the second, third, and fourth, and a reply was filed to the fifth paragraph of the answer. There was a demurrer to the reply. The court overruled the demurrer to the reply, but carried it back and sustained it to the complaint.

This was error. The questions arising in the record are

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the same as those considered and decided by us in *Hopkins v. The Greensburg, etc., Turnpike Co.*, 40 Ind. 44.

No useful purpose could be accomplished by again considering at length the questions so fully considered and decided in the above case, and which have been adhered to in many subsequent cases.

For the reasons stated in that case, the judgment in the present case should be reversed.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to overrule the demurrer to the complaint, and for further proceedings in accordance with this opinion.

N. B. Taylor and *E. Taylor*, for appellants.

J. T. Dye and *A. C. Harris*, for appellee.

NELSON v. CAIN ET AL.

PRACTICE.—*Interrogatories to Party.*—*Sham Pleading.*—The answers made by a party under oath to interrogatories propounded by the adverse party, under section 303 of the code, cannot be examined by the court, for the purpose of sustaining a motion to strike out, as a sham pleading, a pleading which is good on its face; nor can the Supreme Court examine such answers, for the purpose of affirming such action of the lower court.

APPEAL from the Madison Common Pleas.

BUSKIRK, J.—This was an action by the appellees against the appellant upon a promissory note.

The appellant filed an answer consisting of two paragraphs.

1. General denial.
2. Payment.

The appellees filed certain interrogatories, which the appellant, under the order of the court, answered. The appellant was required to answer in regard to the consideration, and

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what payments he had made on the note in suit. In his answer he stated the consideration, and that he had made no payments on the note. When the answers to interrogatories were filed, the appellees moved the court to reject the answer filed by the appellant, upon the ground that the answer was shown by the answers to the interrogatories to be a sham answer. The court sustained the motion, and rejected the answer, and rendered a final judgment on the note for the want of an answer.

The appellant has assigned for error the rejection of the answer.

It was held by this court in *Boggess v. Davis*, 34 Ind. 82, that the answers made by a party under oath to interrogatories propounded by the opposite party, as provided by sec. 303 of the code, 2 G. & H. 189, cannot be used by the court on motion to strike out a pleading as a sham which is good on its face. Such answers can be used only on the trial, and then only at the option of the party who has required them.

A petition for a rehearing in the above case was overruled, upon mature consideration, and the ruling in that case has been followed in several subsequent cases. *Mooney v. Musser*, 34 Ind. 373; *Raleigh v. Tossett*, 36 Ind. 295.

Counsel for appellees admit that the ruling of the court was erroneous, but insist that the judgment should not be reversed for such error, because it appears that the appellant was not injured by such ruling. This court certainly has no greater right to examine the answers to the interrogatories, to determine whether the substantial rights of the appellant were injuriously affected by the ruling of the court below, than the court below had to examine them to determine whether the pleading was sham.

Besides, the general denial cannot well be regarded as sham in any case; for the existence of such answer renders necessary the production, in court, upon the trial, of the note or instrument upon which the action is based; which is fre-

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quently a matter of importance. The court erred in rejecting the answer.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to grant a new trial, overrule the motion to reject the answer, and for further proceedings in accordance with this opinion.

W. R. Pierse and H. D. Thompson, for appellant.

M. S. Robinson and A. W. Thomas, for appellees.

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FRAUD.—Pleading.—Fraud in obtaining the execution of a contract cannot be pleaded without alleging the facts constituting the fraud.

INTOXICATION.—Contract.—The intoxication of a person at the time of his execution of a contract does not render the contract void, but only voidable; and to defend against a contract on that ground, it must have been rescinded by restoring whatever was received as the consideration thereof.

APPEAL from the Posey Common Pleas.

DOWNEY, J.—The appellant filed a claim against the estate of the appellee's decedent, consisting of a promissory note executed by the deceased to one Hutson, and by him indorsed to the appellant. The note was dated the 9th day of December, 1870, and was payable twenty-seven months after date, and was for two hundred and ten dollars.

The administrator set up as defences to the note, 1. That the note was obtained by fraud and without any consideration. 2. That the same was obtained by fraud, in this, that said note was executed by the deceased when he was so intoxicated as to be wholly ignorant of making or signing the same. 3. That there was no consideration. 4. That the deceased never executed the said promissory note.

The plaintiff replied to the whole answer by a general denial, and for a second paragraph of his reply, confined to

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the second paragraph of the answer, he alleged that the consideration of the note was the purchase of certain real estate sold by the said Hutson, the payee, to the deceased, and that the deceased kept and retained said real estate until the time of his death, and that the same had been sold by the administrators of the estate of said deceased as part of the property of his estate.

Upon a trial of the issues by the court, there was a finding for the defendant, a motion made by the plaintiff for a new trial overruled, and judgment on the finding.

The error assigned in this court is the overruling of the motion for a new trial.

The reason for a new trial, as stated in the written motion, was, that the evidence was not sufficient to justify the finding of the court.

We think it essential to the proper understanding of what is decided by the court, that we shall set out the evidence in this opinion :

David Robinson testified as follows: "I recognize the note in controversy. I wrote the name of the deceased to said note, at his request, and he made his mark thereto in my presence. I read the note to him before he signed it. He was pretty drunk. He could write his own name, and did generally write his own name. I did not write my name upon the note as an attesting witness until nearly eighteen months after it was executed."

Downey was killed in two or three days after the note was executed. The note was then read in evidence, and the bill of exceptions informs us that, it appearing that the note had not become due at the time of trial, it was agreed between counsel that no objection should be raised on that account, but that if the claim should be allowed, it should be paid at maturity.

Richard H. Hutson testified as follows: "I am the payee of the note. It was executed in my presence. I sold a house and lot in Wadesville to the decedent, and in consideration therefor the decedent, Downey, gave me two notes,

and this note in question for the interest thereon. This note was a part of the consideration for the sale of said house and lot. I executed to him a deed for the house and lot, and he kept it in his possession until he died. I transferred the note to the plaintiff. Downey was pretty drunk when he signed the note, too drunk to write his own name. The execution of the note by him was in pursuance of the contract previously made between us. The next morning after he signed the note, I met him in Wadesville and asked him how he liked his trade. He said he was perfectly satisfied with the trade, and intended to marry in a few days and move into the house. At this time he was not much drunk. In two days afterwards he was killed. He did not in this last conversation mention the note particularly, but the note was given by him to carry out the agreement first made between us. The decedent could write his name." This was all the plaintiff's evidence.

Benjamin Gwaltney, on behalf of the defendant, testified as follows: "I knew the decedent well. I have seen him write often, but never saw him make his mark. I know nothing else about this matter, except what Mr. Cross told me." This was all the evidence given in the case.

The defence that the note was given without consideration is not sustained by the evidence. On the contrary, it seems to have been given for a valuable and sufficient consideration. Counsel for the appellee call attention to that part of the testimony showing that the note in question was given for the interest on the other two notes, and suppose that Hutson had received full value for the house and lot in the other two notes, and when the deceased was intoxicated got him to give this note to obtain additional pay when none was due. It does not appear that this note was given at a different time from that at which the other two notes were given. Nor does it appear that it was not. It was given, however, for interest on the other two notes. It is probable, or possible, to say the least, that the other two notes were given for the principal of the purchase-money of the real

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estate, and that the note in question was given at the same time for the interest which was to accrue. But if this note was given after the giving of the other two for the interest that had already accrued, it would not, in either case, be without consideration.

We think there can be no question but that the deceased executed the note. There is no conflict in the evidence as to this. That the deceased could write, but on this occasion chose to make his mark and not to write his name, is a circumstance which cannot control the positive contradicted evidence that the signature was written to the note at his request, and that he made his mark thereto in the presence of the witness.

Upon the question as to the other ground of defence there is more room for doubt; that is, whether or not the maker of the note was so much intoxicated as to be incapable of binding himself by the contract. But see *Reinskopf v. Rogge*, 37 Ind. 207. It may be said in this connection, that that part of the reply to the second paragraph of the answer which alleges that the real estate for which the note was given had been sold by the administrator of the deceased, was wholly unsupported by the evidence. The circumstance that on the next day after the note was given, when he was "not much drunk," he expressed himself perfectly satisfied with the trade, cannot have much weight in the case. Counsel for the appellee argue the case, in part, as if there was an answer in showing that the note had been obtained by fraud. But this is a misapprehension. While it is said in one or two of the paragraphs that the note was obtained by fraud and without consideration, we cannot regard that part of these paragraphs which speaks of fraud as amounting to any defence at all. Fraud cannot be pleaded in this general way, but the facts constituting the same must be set out particularly. It is not enough to say that a transaction was fraudulent, or that an instrument was obtained by fraud, but the facts must be alleged. *Curry v. Keyser*, 30 Ind. 214.

Conceding that the evidence shows that the deceased, when he executed the note, was too much intoxicated to bind himself by the contract, which, however, may well be doubted, there is a ground on which even that defence must be held to be insufficient, and that is, that the contract was not, on account of the intoxication of Downey, rendered absolutely void, but was only voidable, and that to avoid it he or his representative must have restored what was received by him under the contract, before he could be relieved from its obligation. In *McGuire v. Callahan*, 19 Ind. 128, it was said by this court: "The plaintiff seeks to avoid the instrument, on the ground of fraud and drunkenness. He cannot, however, treat the instrument as void, and, at the same time, as good. If the instrument is good, the plaintiff can maintain no action to recover the value of the property thus sold, if the defendant has performed the stipulations to be by him performed, which, for aught that appears, he has done. If the instrument is voidable, either on the ground of fraud or drunkenness, the plaintiff, before he can avoid it and maintain an action for the value of the property thus transferred, must place the defendant *in statu quo*, by refunding to him what he has advanced in pursuance of the contract. * * * This doctrine, in our opinion, is as applicable to contracts voidable on the ground of drunkenness, as those voidable on the ground of fraud. Drunkenness does not make a contract void, but only voidable. 1 Story Con., sec. 45, and authorities in note 4, p. 86."

We adhere to this authority as a correct exposition of the law on the subject, and hold that the note which is in controversy in this case is not, on account of the intoxication of the maker at the time of its execution, absolutely void, but only voidable. It follows, according to a well settled rule of law, that to enable the maker or his representative to defend successfully on that ground, there must have been a rescission of the contract, by placing the parties *in statu quo*. As it appears that the maker of the note, as alleged in the second paragraph of the reply, received a deed of convey-

Sloan v. The State.

ance for the real estate for which, in part, the note was given, and it is not alleged or shown by the evidence that he or his representatives ever reconveyed the title, or in any way properly rescinded the contract, the court should have found for the plaintiff upon the evidence, instead of finding for the defendant.

The judgment is reversed, with costs, and the cause remanded, with instructions to grant a new trial.

E. M. Spencer and *W. Loudon*, for appellant.

A. P. Hovey and *G. V. Menzies*, for appellee.

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SLOAN v. THE STATE.

CRIMINAL LAW.—*Indictment.—Assault and Battery with Intent to Murder.—*

An indictment for assault and battery with intent to murder charged that the defendant "feloniously, purposely, and with premeditated malice," did "beat, strike, kick, stamp, trample upon, and wound, with intent, then," etc.

Held, that the indictment sufficiently charged an assault and battery.

SAME.—In an indictment for an assault and battery, it is not necessary that all the words "rude," "insolent," "angry," should be used; if one or more of them be used, or the equivalent of one or more of them, it is sufficient.

APPEAL from the Marion Criminal Court.

DOWNEY, J.—In the indictment against the appellant it is charged that on, etc., at, etc., he did, in and upon one Henry Brandt, feloniously, purposely, and with premeditated malice, make an assault, and him, the said Henry Brandt, did then and there feloniously, purposely, and with premeditated malice, beat, strike, kick, stamp, trample upon, and wound, with intent, then and there and thereby, him, the said Henry Brandt, feloniously, purposely, and with premeditated malice, to kill and murder, contrary to the form of the statute, etc.

A motion to quash the indictment, made by the appellant, was overruled, and he excepted. Upon arraignment and plea of not guilty; he was tried by a jury, and there was a verdict of guilty, a motion in arrest of judgment made by him was overruled, and sentence was pronounced against him according to the verdict of the jury. The errors assigned are the overruling of the motion to quash the indictment, and that in arrest of the judgment. The only question discussed and presented for our decision is as to the sufficiency of the indictment. The specific objection urged by counsel for the appellant against the indictment is, that it does not sufficiently charge the assault and battery. It is not denied but that it properly charges the intent to commit murder, if it sufficiently charges the minor offence.

It is beyond any question necessary that, in such cases, the assault and battery must be charged in the appropriate language, or otherwise there is no foundation for the charge of an intent to commit the higher crime charged. *Adell v. The State*, 34 Ind. 543; *Cranor v. The State*, 39 Ind. 64.

The language of the statute which defines an assault and battery is as follows: "Every person who in a rude, insolent or angry manner, shall unlawfully touch another, shall be deemed guilty of an assault and battery," etc.

It has been held by this court, as a general rule, that it is sufficient for the prosecutor, in charging a crime, to follow the language of the statute defining the same. *The State v. Bougher*, 3 Blackf. 307. The indictment in the case under consideration does not describe the assault and battery in the language used in the statute defining it. But this does not dispose of the case, for this court has decided that it is not necessary to use the exact words of the statute, if other words of equivalent meaning are used; and the criminal code in its rules of pleading expressly provides, that "words used in the statute to define a public offence need not be strictly pursued, but other words, conveying the same meaning, may be used." 2 G. & H. 403, sec. 59; *Corneille v. The State*, 16 Ind. 232.

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The question is, then, are the words used in the indictment equivalent with those used in the statute and omitted in the indictment? It was not necessary that all the words, "rude," "insolent," "angry," should have been used, for they are coupled disjunctively by the word "or." Hence if any one or more of them had been used, it would clearly have sufficed. The word "unlawfully" is also omitted in the indictment. The question is, then, do the ponderous words, "feloniously, purposely, and with premeditated malice," weigh as much in their signification as the omitted words? We think they do. See *Corneille v. The State, supra*, a case somewhat like this. The indictment also omits the word "touch," which is found in the statute. In lieu of it the pleader has used the words "beat, strike, kick, stamp, trample upon, and wound," which, we think, and no doubt the prosecuting witness thinks, are fully equivalent to the word touch. If it were our province to advise, and not merely to decide, we would suggest to those whose duty it is to put in legal form the accusations made by the grand jury, to select their words from the statutes defining the crime which is charged, and not gather them up at random from other sources.

We regard the indictment, notwithstanding its want of accuracy, as substantially sufficient.

The judgment is affirmed, with costs.

J. E. McDonald, J. M. Butler, J. S. Harvey, and F. J. Mattler, for appellant.

J. C. Denny, Attorney General, *R. P. Parker*, and *J. S. Duncan*, for the State.

HERRIN ET AL. v. OLVEY ET AL.

SUPREME COURT.—Record.—Striking Out.—Bill of Exceptions.—Where on appeal to the Supreme Court a pleading struck out by the lower court is not made a part of the record by bill of exceptions, it will be presumed by the appellate court that the ruling was correct.

SAME.—Motion to Transfer Cause.—Where a motion to transfer a cause from the court of common pleas to the circuit court, on the ground that the title to real estate was in issue, was overruled, and on appeal there was no bill of exceptions embodying the motion or showing the ground upon which it was decided;

Held, that the ruling on the motion could not be reviewed.

APPEAL from the Hamilton Common Pleas.

WORDEN, J.—Partition of lands. In the petition it was alleged that Nancy Herrin, who was one of the defendants, was the owner of an undivided one-fifth of two-thirds of the land. Andrew Alford, who was made a defendant, filed a paper which may be regarded as a cross complaint against Nancy, alleging that she, in conjunction with her husband, had executed to him a quitclaim deed for her interest in the land, but that a mistake had been made in the execution of the deed, the land being therein misdescribed. Nancy, by her guardian *ad litem*, answered the cross complaint, first, by general denial, and, second, in avoidance. The second paragraph was stricken out on motion of Alford, and Nancy, by her guardian *ad litem*, excepted.

This ruling is assigned for error. As the pleading thus stricken out is not made a part of the record by a bill of exceptions, we can not notice it. We must presume, therefore, that the ruling in striking it out was correct.

After the pleadings had been filed, Nancy, by her guardian *ad litem*, moved the court, in writing, to transfer the cause to the circuit court, "for the reason that the only issue between the defendants Andrew Alford and Nancy Herrin involves the title to real estate."

The motion was overruled. To this ruling Nancy excepted, as the record informs us, but there is no bill of

exceptions in the record embodying the motion, or showing the ground upon which it was decided. We are of the opinion that no question is properly before us involving the correctness of the ruling on the motion. These are all the questions presented by the assignment of errors and the brief of counsel for the appellants.

W. O'Brien and R. Graham, for appellants.

D. Moss and F. M. Trissal, for appellees.

PRACTICE.—*Motion to Reject Pleading.*—In an action on an account, commenced before a justice of the peace, there was an answer in two paragraphs, of which one was a general denial. A motion to reject the whole answer for insufficiency thereof, filed by the plaintiff, in such a form as to be inseverable, was overruled.

SAME.—Evidence.—Instruction to Find Against Plaintiff.—Where a demurrer to the evidence would be sustained, the court may instruct the jury to find against the plaintiff. Accordingly, where the plaintiff has introduced his evidence and rested, and the evidence introduced does not tend to prove the plaintiff's cause of action, the court may refuse to hear evidence offered by the defendant, and direct the jury to find against the plaintiff.

OSBORN, C. J.—This action was commenced before a justice of the peace, in which the appellant sought to recover on the following account:

“ William C. Wingate, to Anthony Steinmetz, Dr.
To money had and received to the use of Steinmetz, \$20.00
Interest, - - - - - 1.05

The appellee filed an answer of two paragraphs; one,

the general denial; the other, an affirmative answer, in bar of the action. The appellant filed a written motion to reject the whole answer, for the reason that it was insufficient to constitute a defence, and because it was irrelevant, insufficient, and immaterial. Without disposing of that motion, the justice tried the cause, and found for the appellee, and rendered judgment against the appellant.

An appeal was taken to the circuit court, where the motion to reject the answer was renewed and overruled. The cause was tried by a jury, resulting in a verdict for the appellee, and, over a motion for a new trial, judgment was rendered on the finding against the appellant for costs. Proper exceptions were taken to the different rulings of the court.

It will be unnecessary to set out the causes for a new trial.

The errors assigned are, in overruling the motion to reject the answer, and in overruling the motion for a new trial.

There was no error in overruling the motion to reject the answer. It went to the whole answer, including the general denial, and was in such a form as to make it inseparable.

A bill of exceptions is in the record. It contains all the evidence in the case. It also informs us that the appellant introduced his evidence and rested. The appellee was sworn in his own behalf, and while he was testifying, the court, of its own motion, stopped the further examination of witnesses, and gave the following charge:

"Gentlemen of the jury, there being no evidence to sustain this action, you will find for the defendant." The language of the bill of exceptions, following the charge, is as follows: "To all of which plaintiff at the time excepted."

We have examined the evidence, and are of the opinion that there was no evidence before the jury tending to prove the plaintiff's cause of action, and he could not introduce any more evidence in chief, without special permission. In such case, the court may refuse to hear evidence offered by

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the defendant, and charge the jury to find against the plaintiff. *Nixon v. Brown*, 4 Blackf. 157; *Porter v. Millard*, 18 Ind. 502. Where a demurrer to the evidence would be sustained, the court may instruct the jury to find against the plaintiff. *The Governor v. Shelby*, 2 Blackf. 26.

In the case at bar there was an absolute deficiency in the testimony, which could not be supplied by intendment or inference.

The judgment of the said Ripley Circuit Court is affirmed, with costs.

G. Durbin, for appellant.

KEIGHTLEY v. THE BOARD OF COMMISSIONERS OF PUTNAM COUNTY.

COUNTY COMMISSIONERS.—*County Auditor*.—*Salary in Lieu of Allowance*.—

A board of county commissioners may not by its order, made with the assent of the county auditor and upon his agreement with the board, allow him an annual salary, payable quarterly out of the county treasury, in lieu of the specific allowances which the board is authorized to make him for his services; and the fact that such an agreement and order had been made and acted upon during the continuance of an auditor in office, and that final settlement and payment had been made under such order and agreement at the expiration of his term of office, it was *held*, constituted no defence to a suit by the auditor against the board, to recover for his services, though the amount paid him under the order might be set off against his claim.

APPEAL from the Putnam Common Pleas.

DOWNEY, J.—This action was brought by the appellant against the appellee, and there was judgment for the defendant. The errors assigned in this court are the overruling of the plaintiff's demurrers to the fourth, fifth, and sixth paragraphs of the answer of the defendant, and the sustaining of the demurrers of the defendant to the third

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and fourth paragraphs of the plaintiff's reply to the fifth and sixth paragraphs of the answer. The plaintiff was elected auditor of Putnam county in 1863, and he alleges that he then entered upon the discharge of the duties of his office for the term of four years then next following, and that during said time he rendered services and was entitled to receive pay for such services, according to law, in the amount of twenty-five thousand dollars, a bill of particulars of which is filed with the complaint, which amount he alleges is due and remains unpaid.

The defendants pleaded: 1. A general denial. 2. Payment. 3. Set-off. 4. That the plaintiff is justly indebted to the defendant for money had and received of the defendant, at the hands of the treasurer of said county of Putnam, for the use of the defendant, in the sum of twenty-seven thousand dollars, as per bill of particulars hereto attached, which sum the defendant offers to set off against so much as may be found due the plaintiff on his said demand, and asks judgment for the residue, to wit, *twenty-seven thousand dollars*. 5. That the defendant, on the 15th day of March, 1864, allowed and paid to the plaintiff nine hundred and forty-six dollars and fifty-nine cents, in full for his services to that date; that the plaintiff then proposed to the defendant that for all services, as such auditor, to be rendered subsequent to that date, he would receive, in gross, the sum of twenty-seven hundred and fifty dollars per year, in full of all charges that might be made by him against Putnam county for such services, he receiving and enjoying all fees properly taxable against individuals, all regular expenses of the office to be paid by said county, and he not being required to present at each regular session of the board an account of his services; that the defendant accepted his offer, and they directed and he entered an order in acceptance thereof, a copy of which order is made part of the answer; that the plaintiff up to the close of his term of office acted under said agreement.

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and for each full quarter accepted his quarterly allowance for said services under said contract, of six hundred and eighty-seven dollars and fifty cents, which was paid to him by the treasurer of said county, and for the fractional quarter ending at the date of his resignation as such auditor, on the 20th day of October, 1866, he was allowed and paid three hundred and eighty-two dollars, which was a full and final compensation under said agreement; that all the regular expenses of said office during said time were paid by the county, and the defendant had and received for his own use and profit all the fees of said office taxable to and due from individuals; all of which were had and accepted by the plaintiff in full satisfaction of all claims against the defendant for his services as such auditor, and the said contract was executed, satisfied, and discharged by both parties long before the commencement of this action. 6. The sixth paragraph is in substance the same as the fifth. The order made by the board as evidence of the agreement mentioned in the fifth and sixth paragraphs of the answer, a copy of which is filed with those paragraphs, is as follows: "Comes now Elijah T. Keightley, auditor, and the board of commissioners, after advisement, do agree that the said E. T. Keightley, as auditor, is to receive for his services, as such auditor, the sum of twenty-seven hundred and fifty dollars per year, in full of all charges that may be made by him against the county, for such services. The said auditor is to receive extra all fees that are due from individuals. The said auditor is to do all legitimate work of said office. The regular expenses of the office to be paid by the county."

Counsel for the appellant argue the insufficiency of the third paragraph of the answer. But that paragraph was held bad on demurrer in the common pleas, and upon that action of the court no error is assigned by either party.

It is urged that the fourth paragraph of the answer is bad, for the reason that no "sufficient" bill of particulars was filed under it. It is not disputed but that a bill of particulars was filed. The point is that it is not sufficient. Perhaps

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where a bill of particulars has been filed, and the question is as to its sufficiency, the question ought to be made in the court below by a motion for a further bill of particulars, as authorized by sec. 79, 2 G. & H. 105. But however this may be, the bill of particulars in this case under the fourth paragraph was sufficient. It was headed, "Dates and amounts of money had and received of the board of commissioners of Putnam county, by Elijah T. Keightley," and then followed the several amounts, with the year and month on the left, opposite each item.

The question on which the fifth and sixth paragraphs of the answer depend is the same, and that is, can the commissioners, by an order of the board, made with the assent and upon the agreement of the county auditor, allow him an annual salary, payable quarterly out of the county treasury, in lieu of the specific allowances which the board is authorized to make him for services rendered by him? If the board can legally do this, then the paragraphs of the answer in question are a good bar to the action. On the contrary, if the board can not legally make such allowance, the paragraphs were no defence to the action, and the demurrers to them should have been sustained.

In our opinion, the board of commissioners had no legal power to make such allowance. If the board can fix such allowance and pay the same, the amount which they shall fix and pay must necessarily rest in their discretion, and there would seem to be no limit to the amount which they might allow. We think they have not been intrusted with any such power. No statute giving them this power has been brought to our notice by counsel, and we know of none. On the contrary, the fee law in force at the time fixes specific amounts which shall be allowed to the auditor for his services, and by this standard, we think, must his compensation for services be measured. 1 G. & H. 333. The fact that the amount agreed upon had been paid can make no difference, when the agreement under which it was paid is invalid. A party can not set up and succeed upon an invalid contract or

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agreement as a defence, any more than he can use it successfully as a foundation for an action. What has been paid will be a proper set-off against the services rendered, as we suppose, and if equal in amount to the claim of the appellant, may defeat his action entirely. We hold that the fifth and sixth paragraphs of the answer are both defective, and that the demurrers to them should have been sustained.

The question as to the paragraphs of the reply need not be decided.

The judgment is reversed, with costs, and the cause remanded, with instructions to sustain the demurrers to the fifth and sixth paragraphs of the answer, etc.

D. E. Williamson, A. Daggy, J. E. McDonald, A. L. Roache, J. M. Butler, and E. M. McDonald, for appellant.
S. Turman, for appellee.

STINGLEY ET AL. v. THE SECOND NATIONAL BANK OF LAFAYETTE.

PROMISSORY NOTE.—*Attorney's Fees.—Pleading.*—In a promissory note, a provision for the payment of attorney's fees, if suit be instituted on the note, is valid; and if it were invalid, a complaint on the note would not be rendered insufficient by a clause alleging the value of the attorney's fees.

PRACTICE.—*Trial Without Issue.*—Where the parties to an action, without objection, go to trial without an issue formed upon the complaint, the defendant can not, after verdict, complain of the want of an issue.

APPEAL from the Tippecanoe Common Pleas.

DOWNEY, J.—This was an action by the appellee against the appellants on a promissory note, by which they promise to pay a certain sum of money with ten per cent. interest after maturity, the interest until maturity, at that rate, having been paid in advance, and attorney's fees if suit was brought on the note. The complaint is in two paragraphs. The second alleges the value of the attorney's fees to be

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one hundred dollars. The first has no allegation as to the value thereof. The defendants answered the first paragraph of the complaint by a general denial, and demurred to the second paragraph, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled. By agreement of the parties, the cause was then submitted to the court for trial without a jury, and there was a finding for the plaintiff, for the amount of the note and the attorney's fees. The defendants asked the court to set aside the verdict and grant a new trial, which the court refused to do, but rendered judgment for the amount of the finding and costs.

The errors assigned are the overruling of the demurrer to the second paragraph of the complaint, overruling the motion for a new trial, and proceeding to the trial of the cause without an issue upon the second paragraph of the complaint.

There was no error in overruling the demurrer to the second paragraph of the complaint. The objection made to it by counsel for the appellant, that the clause in the note for the payment of attorney's fees rendered the note usurious and the second paragraph of the complaint therefore bad, can not be sustained. If that clause was conceded to be invalid, the promise to pay the principal sum mentioned in the note would constitute a valid and sufficient cause of action. But such a stipulation in a note has been too often held valid by this court to admit of serious question now. *Smith v. Silvers*, 32 Ind. 321; *Stoneman v. Pyle*, 35 Ind. 103; *The First National Bank, etc., v. Canatsey*, 34 Ind. 149. Other cases might be cited.

The question relating to the attorney's fees was presented in the motion for a new trial, the evidence in proof of the amount of the fees having been objected to on the trial, and admitted over the defendant's objection. This is the only point presented under this assignment of error, and we need not say anything in disposing of it in addition to what we have already said.

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With reference to the third alleged error, that is, proceeding to trial without an issue formed on the second paragraph of the complaint, it is only necessary to say that it, too, has been frequently decided by this court. There are many cases in the early volumes of the decisions of this court holding that it is error to go to trial without an issue. But under the more liberal, and perhaps more just system introduced by the code, it has, for many years, been held, that where the parties go to trial without an issue and without objection, the error is waived. *Train v. Gridley*, 36 Ind. 241, and cases cited.

The judgment is affirmed, with eight per cent. damages and costs.

R. C. Gregory, for appellants.

S. A. Huff and *B. W. Langdon*, for appellee.

WALLACE v. ELLIS.

HUSBAND AND WIFE.—PARENT AND CHILD.—*Liability for Board.*—In an action to recover on an account for boarding the wife and children of the defendant, it appeared in evidence that the plaintiff boarded said wife, who was his sister-in-law, and said children, for a number of weeks, at his home, having contracted therefor with her, and having no knowledge of her separation from her said husband when she engaged board; that said husband and father, during the time of said boarding, resided at a distant part of the State; and that he had a home for his said wife and children and provided for them, and had the home and provisions for them during the time of said boarding, which they did not need, and which was not contracted for or authorized by him.

Held, that these facts did not render the defendant liable for the board of his wife or his children.

APPEAL from the Floyd Common Pleas.

DOWNEY, J.—This action was by the appellee against the appellant, on an account for eight weeks board of the wife and two children of appellant, fifty-six dollars.

On the trial on appeal in the common pleas, which was to the court, without a jury, the following was all the evidence: The appellee testified in his own behalf: "I reside at New Albany, Indiana, and during the year 1870 I boarded the wife and two children of the defendant for the period of eight weeks, at my house; it was reasonably worth fifty-six dollars for that time; I contracted with her to board them, but we did not agree upon the price." On cross-examination, he said, "I had no contract with the defendant to board them for that or any other time. Defendant's wife is my wife's sister. I did not know of separation of defendant and wife, when she engaged board of me."

The appellant testified in his behalf as follows: "I am the defendant. During the time the plaintiff speaks of, I resided at Fort Wayne, Indiana. I made no contract with the plaintiff to board my wife and two children, and I never authorized him to board them. They needed none, for I had a home for them and provided for them all myself, and during the time he speaks of I had the house and provisions for them." On cross-examination, he said, "I had two children. The children would have starved if some one had not provided for them."

All persons supplying the food, lodging, and raiment of a married woman, living separate from her husband, are bound to make inquiries, and they give credit at their peril. If the wife elope, the husband is not chargeable even for necessities. The very fact of the separation is sufficient to put a person on inquiry. The duties of husband and wife are reciprocal. The duties of the wife, while cohabiting with her husband, form the consideration of his liability. 2 Kent Com. 147, and cases cited. In *Vanuxen v. Rose*, 7 Ind. 222, which was for goods sold to the wife, the question turned upon the evidence. The court said: "The record professes to set forth all the evidence. We have examined it, and are decidedly of the opinion that, prior to the sale of the goods, the plaintiffs had good reason to believe that she had separated herself from the defendant.

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There was at least enough in the facts within their knowledge at the time of the sale, and in the circumstances under which she purchased, to put them upon inquiry; and having thus sold the goods to the wife, they are not entitled to charge the husband."

In the case under consideration, the evidence shows that the defendant made no contract for the boarding of his wife; that during the time, the defendant had a home and provisions for her and the children at Fort Wayne. The wife, a sister-in-law of the plaintiff, contracted with the plaintiff for boarding for herself and children, without fixing upon any price, and remained in his family as a boarder for eight weeks. He says he knew of no separation of the husband and wife when she engaged board. It does not appear that there ever was any separation by the defendant from his wife, unless it can be inferred from the fact that she and the children were absent from the home in Fort Wayne. It appears rather that she had abandoned her husband and his home. We think the evidence does not show any liability on the part of the husband to pay for the board of the wife, under the circumstances. It is not the policy of the law to encourage the living apart of husbands and wives. The allowance of the claim in this case as a valid demand against the husband would have that tendency. The circumstances were such as to put the plaintiff on inquiry. Such inquiry, if the evidence is true, would have resulted in ascertaining that the defendant was ready and willing to provide for his wife at home.

The age of the children does not appear. If they were adults, the father was not bound by law to support them. If they were minors, still we think the circumstances do not show a right in the appellee to supply them with boarding and charge the appellant. When the father is able, ready, and willing to support his minor children at his home, another can not supply them abroad and charge him, without his assent. Here, as we have said, we think the circumstances were sufficient to charge the plaintiff with the duty

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of inquiry, which, in effect, was notice of the facts which an inquiry would have enabled him to ascertain. 2 Kent Com. 192. If a husband living in a state of separation from his wife suffer his children to reside with her, he impliedly constitutes her his agent to order necessaries for the children on his credit. Chit. Con. 167; 2 Kent. 192. But the facts proved do not bring the case under consideration within this rule.

The judgment is reversed, with costs, and the cause remanded, with instructions to grant a new trial.

J. H. Stotsenburg, for appellant.

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PRACTICE.—*Supreme Court.*—Where the evidence is not in the record, no question for review can be presented on the ground of insufficiency of the evidence or newly-discovered evidence.

SAME.—Where there has been a recovery for a larger amount than the pleadings will authorize, a judgment may be reversed on the ground of excessive damages, though the evidence be not in the record.

APPEAL from the Monroe Common Pleas.

DOWNEY, J.—Hansford sued the appellant and appellee on a promissory note made in 1862, and this was a proceeding upon a cross complaint, by Benjamin Hall, the appellee herein, against John Hall, the appellant, to settle a question between them, in which Hansford was not particularly interested. The case was here once before, and is found reported in 34 Ind. 314. The appellee alleged in his cross complaint that the note on which the suit was brought by Hansford was given by the appellee and appellant for the sum of one hundred dollars, fifty dollars of the amount having been loaned to each of them, and each becoming security for the other for the sum loaned to him; that he, Benjamin, had

fully paid off his part of the note, and twenty-five dollars in addition thereto, and that a judgment had been rendered for the balance in favor of Hansford. The said Benjamin prayed that he might be adjudged security for John for the balance due, and for judgment against said John for twenty-five dollars, the costs of this proceeding, and other proper relief.

John Hall answered the cross complaint by a general denial. He also answered by way of cross complaint against Benjamin, stating that each party was principal in the note for fifty dollars and the other was his security; that he, John, paid off the portion of the note for which he was liable as principal, and that there remained a balance due for which judgment had been rendered in favor of Hansford; wherefore he prayed that he be adjudged surety of Benjamin for the balance due on the note, and have judgment for costs theretofore expended by him, and for other proper relief.

A trial of the issues by jury resulted in a verdict for Benjamin Hall, assessing his damages at sixty-four dollars and fourteen cents. A motion was made by John for a new trial for the following reasons: 1. The verdict is contrary to the evidence. 2. It is contrary to law. 3. The damages are excessive. 4. Newly-discovered evidence.

This motion was overruled by the court, and final judgment was rendered for the appellee on the verdict.

The errors assigned are: 1. The overruling of the motion for a new trial. 2. Rendering judgment for Benjamin Hall in excess of the plaintiff's demand.

The evidence is not in the record, and therefore there is no cause for a new trial on the ground of insufficiency of the evidence, or on account of newly-discovered evidence.

Is the amount of damages excessive? The note to Hansford was dated February 2d, 1862, at one day. The cross complaint of Benjamin Hall was filed August, 1871. Supposing that the twenty-five dollars paid by him over and above his share of the note was paid at the maturity of the note, which is all that he can claim, there would be, if we

do not mistake, nine years and six months interest to be added to the twenty-five dollars to make the utmost amount which Benjamin could claim. If this interest is fourteen dollars and twenty-five cents, it would make, when added to the twenty-five dollars, the sum of thirty-nine dollars and twenty-five cents. But the verdict was for sixty-four dollars and fourteen cents, an excess of twenty-four dollars and eighty-nine cents over the amount which the cross complaint shows to be due the appellee. This much appears without any bill of exceptions, and shows that the damages were excessive, as alleged in one of the reasons for a new trial. It seems probable that the jury found for the appellee the total amount of the principal and interest of one-half of the debt to Hansford, without reference to the question, whether that amount had been paid by the appellee to Hansford or not. They were only authorized under the pleading to find for the appellee for the twenty-five dollars paid by him and the interest on it, and should have found whether he was surety or not for John for the residue of the debt not then paid to Hansford. The appellee could not recover for money paid for his principal, in excess of the amount which he had really paid, and in excess of what he alleged he had paid.

The judgment is reversed with costs, and the cause remanded for a new trial.*

BUSKIRK, J., having been attorney for Hansford, did not participate in the decision of this cause.

P. C. Dunning and *J. F. Pittman*, for appellant.

J. H. Loudon and *C. W. Henderson*, for appellee.

*Petition for a rehearing overruled.

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FIRE INSURANCE.—Principal and Agent.—Ratification.—A. and B. were equal partners in the business of insurance agency at the town of N., the former alone being the agent of some companies, the latter alone of others, and both jointly of others, they having a common office and acting together in soliciting business, the profits from all the agencies being divided between the partners. During a temporary absence of A., a policy of re-insurance in a certain company of which he alone had been appointed agent at N., and concerning which he alone had complied with the statute relating to foreign insurance companies, was, upon application, issued, countersigned by B., in the firm name, as agents. It had been understood between A. and B. and the agent who had appointed A., that B. was to participate in the business and instruct A. in its duties. The policy contained a provision that it should not be valid unless countersigned by the company's duly authorized agent at N. The policy had been previously signed by the president and secretary of the company. The premium was paid to B. and accounted for by A., in his next monthly report to the company, A. having returned to N., and having been informed of the issuing of the policy and of its having been so countersigned in the firm name. Before making said report, A. was wrongly informed that the insured property was being removed to another state. The general agent of the company, upon being informed of the issuing of the policy and receiving a copy thereof, made some objections to A. as to the character of the risk, and A. informed said general agent that the property was being removed from the State, and that the policy would be cancelled. The re-insured company was in no way connected with or responsible for the statement that the property was being removed, and had no information concerning the objections raised by the general agent. About one month after the issuing of the policy of re-insurance and the payment of the premium, the property was destroyed by fire, the premium not having been returned or tendered to the re-insured company, which had no notice of dissatisfaction of the company that issued the policy or of its desire to cancel it.

Held, that neither A. nor the general agent having taken any steps to undo the acts of B. by returning the premium, or seeking to have the policy cancelled, or giving notice of dissatisfaction to the re-insured, but having allowed the re-insured to rest under the belief that the risk was complete and satisfactory; there was a ratification by the general agent, and hence by the insurance company, of the issuing of the policy.

APPEAL from the Floyd Circuit Court.

DOWNEY, J.—This was an action by the appellant against the appellees. The first paragraph of the complaint was upon a policy of re-insurance, alleged to have been made by

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the appellees to the appellant. The second was upon a contract of re-insurance in writing, alleged to have been executed and delivered by the appellees to the appellant in the usual form of policies of insurance issued by the appellees, in every respect, except that it was not countersigned by the agent of the company. The third was upon an agreement to re-insure, and set out a copy of the instrument, which it was agreed should contain the provisions of the contract, alleging that the appellees delivered the instrument signed by its president and secretary, but failed and neglected to have the same countersigned by its agent, although the premium was received, and the risk assumed, and concluded with a prayer for the reformation of the contract, so that the same might be properly countersigned, for judgment for the amount due under the agreement, and for general relief.

We think it unnecessary to notice particularly the different paragraphs of the answer filed by the defendant. A general denial was filed, and also a paragraph of *non est factum*, to all the paragraphs of the complaint.

Upon a trial of the cause by the court, there was a finding for the defendants, a motion for a new trial was made and overruled, and final judgment for the defendant rendered.

Several errors are assigned, and among others, it is alleged that the court erred in overruling the motion of the appellant for a new trial. A disposition of this point will decide the material questions in the case. One of the reasons for a new trial was, that the evidence was not sufficient to justify the finding of the court.

We cannot well set out all of the evidence, on account of its length; but we will set out the material facts of the case, as disclosed, so that the ground of our decision may be clearly understood. We may say, before doing so, however, that the case turns mainly upon the question whether the policy was countersigned by the agent of the company at New Albany, or if not, whether the agent of the company at that place, or the general agent of the company at Erie, Pennsyl-

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vania, or both of them, so ratified and affirmed the act as to render it binding upon the company.

The principal office of the appellant was at Covington, Kentucky, and it had an agency at Louisville, in that State. The general office of the appellee was in Philadelphia, Pennsylvania. Its western department was under the management and control of J. F. Downing, general agent, his office being at Erie, Pa. At the time when the policy was written, and for some time before and afterward, Elijah Sabin and Samuel C. Fisher were equal partners at New Albany, in the business of life, fire, and marine insurance, representing several companies. They had been jointly appointed the agents of some of the companies. Sabin alone had been appointed agent of others of the companies, while Fisher alone was the appointed agent of the appellees, and perhaps of one or more other companies. Fisher alone had complied with the requirements of the statute relating to foreign insurance companies, so far as the appellees were concerned. They had a common office, acted together in soliciting business, and divided the profits arising from all the agencies between them. On the 28th day of August, 1866, the appellant, through its agent at Louisville, issued its policy of insurance to J. S. Hall & Co., upon their engine, shafting, machinery, patterns, flasks, and stoves, finished and unfinished, contained in the west wing of the Indiana state prison, at Jeffersonville, formerly used as a tobacco factory and cooper shop, as shown by a diagram of the prison, and then occupied by the assured as a stove factory. The policy was in the sum of ten thousand dollars, and was to run for one year. The policy of re-insurance, on which the first paragraph of the complaint is founded, was of the same date, and for the same time, and assumed one-half of the above named risk. The premium in the original policy was two hundred dollars, and that in the policy of re-insurance was one-half of that amount. The appellants afterward re-insured the other half of the risk in another company.

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No further notice of this circumstance need be taken in disposing of this case, as this loss was adjusted and paid.

It is apparent from the evidence that Fisher was not an experienced insurer, when he was appointed the agent of the appellees, and that it was understood between Sabin, Fisher, and one Goodrich, the appointing agent of the appellees, that Sabin was to participate in the business of the agency, and instruct Fisher in the discharge of his duties. At the time of assuming the risk and issuing the policy of re-insurance, Fisher was absent from the office. A clerk or agent of the appellant went to the office with a memorandum of the amount of re-insurance desired, the time, description of the property, as in the original policy, etc., and not finding Fisher, presented the same to Sabin and requested the re-insurance. Sabin took the memorandum, and after examining it handed it to a clerk of the firm, in the office, to fill out the policy. The clerk took a blank form and filled up the policy as requested, the same being already signed by the president and secretary of the company. When this was done, Sabin wrote at the bottom the words: "Sabin and Fisher, agents." The statement of the policy with reference to the countersigning thereof is, that it "shall not be valid unless countersigned by said company's duly authorized agent at New Albany, Ind.," and the words immediately preceding the signatures are these: "countersigned at New Albany, Ind., this twenty-eighth day of August, A. D., 1866." The policy was numbered 108, and is referred to by this number in the correspondence concerning it. The policy, in this form, was delivered to the clerk or agent of the appellant, but it was afterward returned the same day, that permission for further insurance might be indorsed upon, or inserted in it, which Sabin did in these words: "Other insurance allowed without notice unless required by this company." On the day of the date of the policy, or on the next day, the premium was paid to Sabin. Just when the premium was remitted or reported to the general agent at Erie does not appear, but it was the duty of Sabin

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and Fisher, as it appears, to make monthly reports and accounts to the general agent. So that it might be presumed that it was reported to, and received at, Erie, early in September, if it were not for the evidence of Fisher, who testifies, and whose report shows, that it was embraced in his September report, which report was in his own handwriting. Prior to this date, Fisher had returned to New Albany, and was made acquainted with the fact that the policy had been issued by Sabin in the name of Sabin and Fisher, as agents. It appears that before the report for September was made, on or about the 20th of that month, Fisher, in negotiating insurance in favor of another party, on property at the prison, got the impression, from that party, that the property on which the risk had been taken by the appellant, and which, in part, was re-insured by the appellees by policy No. 108, had been removed, or was being removed, to Louisville, by which the risk would be terminated. The appellant was in no way connected with this misunderstanding on the part of Fisher. This information, however, turned out to be incorrect. Downing, the general agent at Erie, had been absent from his office during the first part of September, but having returned on the 19th day of September, 1866, he wrote to Fisher as follows:

“ERIE, PA., Sept. 19th, 1866.

“S. C. FISHER, Esq., New Albany, Ind. :

“DEAR SIR, Copies of policies Nos. 108, 109, and 110, have just come to hand. I am somewhat surprised that you should have put us on the special hazard covered by policy 108, without previous reference to this office by application and survey. Those prison risks, owing to the extra moral hazard, are considered specially undesirable, particularly, when they are also of the special hazard class. We very much desire to know what kind of building it is that contains the engine, machinery, and stock insured. If brick or stone, we may conclude to carry the risk. Please send us application and full survey at your earliest convenience. As a rule,

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please note that we desire all specials to be referred to this office before issue of policy.

“Yours very truly,

“J. F. DOWNING, Gen. Agent.”

In answer to this, Fisher wrote as follows :

“NEW ALBANY, IND., Sept. 27th, 1866.

“MR. J. F. DOWNING, Esq. :

“DEAR SIR, I send application of Messrs. Hall, Moore, and Miller, and want your answer. The first application got misplaced, if not sent. Application No. 108, as I stated, was moved yesterday, and policy will be cancelled. I presume that don't matter to us, if they moved the property to another locality; they are moving it out of the State to Louisville, Ky. I hope all will be satisfactory; excuse any wrong in business on my part, as I have been absent from the office most of the time this month, on account of sickness. I will attend to business myself now and make all satisfactory.

“Yours very respectfully,

“S. C. FISHER, Agent.”

And on October 1st, 1866, the day of the fire, he wrote to Downing a letter, of which the following is the postscript :

“P. S. Messrs. Hall, Moore, and Miller, on policy No. 108, have not sent in their policy yet to have it cancelled. They have moved the most of their stock; that I presume it does not matter to us, as the policy is void if the goods are removed without permission.

“S. C. FISHER, Agent.”

On the 6th of October, 1866, Downing wrote to Fisher as follows :

“ERIE, PA., October 6th, 1866.

“S. C. FISHER, Esq., New Albany, Ind. :

“DEAR SIR, Your favor of the 1st inst. came duly to hand.

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Contents noted. Pleased to hear that we escaped loss by not renewing policy No. 13; but how about No. 108? You say you were expecting that policy would be sent in for cancellation, that the property had been nearly all removed. I see that a fire occurred at the prison on the night of the 1st, just after date of your letter, and have been looking anxiously for a letter from you, with information as to the result. Nothing coming to hand, I take it for granted we escaped loss. I trust this is so. Should dislike to get our fingers burned so soon, as penalty for going outside our rules of business.

“Yours very truly,

“J. F. DOWNING, Gen'l Agent.”

On October 2d, 1866, Fisher wrote to Downing, informing him of the loss, but the letter is not in evidence. The answer to it is as follows:

“ERIE, PA., October 6th, 1866.

“S. C. FISHER, Esq., New Albany Ind.:

“DEAR SIR, Yours of the 2d inst. just to hand, informing us of loss under policy No. 108. This is unexpected, as you state, in your letter of the 27th ult. and the 18th inst., that property covered by policy No. 108 was being removed. ‘Nearly all out,’ you say in letter of the 1st. It must be that you meant to say policy No. 113. Were it not for this error, we would not have had more than \$2,500 on No. 108, the most we would have carried, since we make it a rule to keep out of state’s prison. Mr. Higgins will go down and fix the thing up.

“Yours very truly,

“J. F. DOWNING, Gen'l Agent.”

The evidence shows that Higgins did “go down,” but did not, as seems to have been intended, adjust the matter. The proofs of the loss were made, to which there is no objection. The appellant paid the loss on the original policy, but the appellee refused to pay the loss under the policy of re-insurance. Downing wrote a final letter, of date the 27th

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of December, 1866, in which he assumed two grounds, on which the appellees are not liable: 1. That the appellant did not retain one-half of the risk insured; and, 2. That the policy was countersigned by Sabin and Fisher, and not by Fisher alone. In this letter he makes this statement:

"The risk in question was never accepted by this company, but, on the contrary, was immediately objected to on our receiving the report thereof; the fact that the policy, so called, not having been taken up, being attributable to a misunderstanding of our agent, S. C. Fisher, in regard to the removal of the property. Mr. Fisher having reported to us that the property covered by said policy was being removed to Louisville, Ky., and that we had nothing at risk, a mistake on the part of Fisher, as it subsequently appeared, so far as the removal was concerned."

There is no evidence to show that the appellant had any notice, at any time, of any dissatisfaction of the appellees as to the risk which they had taken, or of any desire on their part to cancel the policy. The premium was not returned or even tendered back to the appellant, until in December, 1866, or later, and long after the fire, by which the property was destroyed, occurred.

We are aware of the general rule, that an agent can not delegate the powers conferred upon him by his principal, by conferring them upon another, unless he has been specially empowered by the principal to do so; and here it might be a question of some difficulty whether Fisher could authorize Sabin to act in his stead as the agent of the appellees, if it was necessary to put the case upon that ground exclusively. Fisher alone had been appointed agent of the appellees according to the requirements of the statute on the subject of such agencies, and it is fair to presume that he had been appointed on account of his supposed qualifications and fitness for the agency. Such is the reason of the rule, at all events, whatever may have been the facts in this particular case. In speaking on this subject, Judge STORY says: "This being a trust or confidence reposed in the agent personally,

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it cannot be assigned to a stranger, whose ability and integrity might not be known to the principal, or who, if known, might not be selected by him for such a purpose." Story Agency, sec. 13. Whether a risk shall or shall not be taken upon property offered for insurance, is a question of the greatest moment, and one upon which the company might wish and be entitled to the judgment of its designated and appointed agent. Whatever may have been the intelligence, discretion, integrity, and business capacity of Sabin, he was not the man who had been designated and appointed by the appellees as their agent for the discharge of the duty in question.

But this consideration does not dispose of the case. When Fisher returned to the office, he was fully informed as to what Sabin had done in his absence, and, although the evidence shows that he made some objection to Sabin, as to the manner in which the business had been done, he did not take any steps to undo it, by returning the premium and cancelling the policy, or even by giving any notice of his dissatisfaction to the re-insured. On the contrary, he accounted for the premium to the general agent, and sent him "copies of policies Nos. 108, 109, and 110," as shown by the letter of Downing of September 19th, 1866. As Downing received a copy of the policy No. 108, he had notice of the fact that it was countersigned, "Sabin and Fisher." Downing, in that letter, although he expresses surprise that Fisher should have put them on the special hazard covered by policy 108, without previous reference to that office by application and survey, does not repudiate the act of Fisher or of Sabin and Fisher, but, on the contrary, expresses a willingness under certain circumstances to "carry the risk." He desires Fisher to give him further information as to the condition and nature of the property at risk, and for that purpose asks to have sent to him the "application and full survey." During all this time, as Downing must have known, the appellant is resting under the belief that the risk is complete and satisfactory to the appellees.

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Fisher sent the application in his letter of September 27th, 1866, and in this letter makes a statement which turns out to have been untrue, resulting from a mistake of his own or his informant, with which the appellant was in no way concerned. An allusion to this same matter is the subject of the postscript to his letter of October 1st, 1866, written on the day of the fire, but before it occurred. If, when Downing received the application for which he wrote, he concluded not to "carry the risk," he failed, so far as appears, to make that fact known to any one. On the contrary, it seems pretty clear that he did conclude to carry the risk, as otherwise he would not have inquired so anxiously about "No. 108," when he saw that a fire had occurred at the prison, as he did in his first letter of October 6th, 1866. Why, in any other view of the case, would he express so much anxiety for a letter from Fisher with information as to the result, and hope that his company had escaped loss. Why should he express his "dislike to get our fingers burned so soon," etc. But we think the second letter of Downing of October 6th is conclusive on this subject. He then attributes the fact that they had more than \$2,500 to Fisher's error in writing that the insured property was being removed from the prison, and ends with the statement, that "Mr. Higgins will go down and fix the thing up." The extract from Downing's last letter, in which he attempts to show that the company is not liable, which we have given, attributes to Fisher's misunderstanding as to the removal of the property the fact that the policy had not been "taken up." It was not generous in Downing to attempt to shield his company on the ground of a mistake of his own agent, with which the appellant had no concern. Indeed, it was not even legal that he should do so; for if any one must suffer from the mistake of the agent it must be the principal, and not third persons.

We have no doubt that it should be held, under the circumstances disclosed, that there was a ratification by the general agent, Downing, and hence by the company, of the

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issuing of the policy in this case, and the countersigning of it. To hold otherwise would be to hold that the company, with a full knowledge of the facts, and with the premium for the risk in its hands, the assured believing and having the right to believe that the contract was valid and binding, could escape from the liability which it knew to be resting upon it. This we are not willing to do. On this question we refer to the case of the *Ætna Ins. Co. v. Maguire*, 51 Ill. 342, and also *Insurance Co. v. Webster*, 6 Wal. 129.

We cannot regard the statute relating to agents of foreign insurance companies as affecting the case, in the view which we have taken of it. Fisher, the duly appointed agent, adopted and acted upon what Sabin had done in his absence, and Downing ratified and approved what had been done by both and each of them. In our opinion, the court should have found for the appellant on the first paragraph of the complaint.

We have not been favored with a brief from the appellee.

The judgment is reversed, with costs, and the cause remanded, with instructions to grant a new trial.

G. V. Hawk, J. H. Stotsenburg, and T. M. Brown, for appellant.

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VOID JUDGMENT.—An illegal and void judgment will not bar another suit upon the same cause of action.

SAME.—*Jurisdiction of Person.*—If a defendant, against whom a judgment is rendered, received no notice, either actual or constructive, of the pendency of the action, the judgment is a nullity.

PRACTICE.—*Assignment of Error.*—*Sufficiency of Complaint.*—In an action commenced before a justice of the peace, where a cause of action was filed, a party cannot, in the Supreme Court, assign for error that no cause of action was filed with the justice, and thereby raise a question as to the sufficiency of the cause of action.

APPEAL from the Cass Circuit Court.

BUSKIRK, J.—This action originated before a justice of the peace, where the appellee recovered a judgment against the appellants. The appellants appealed to the circuit court, where, we are informed by the clerk, they moved to dismiss the action, which was overruled and an exception taken. The motion is not copied into the record, nor does the clerk inform us for what reason a dismissal was asked. The question is not reserved by a bill of exceptions. The clerk cannot thus make a record for this court.

The cause was tried by the court, and resulted in a finding for the appellee, and, over a motion for a new trial, judgment was rendered on the finding.

The only available assignment of error is based upon the refusal of the court to grant a new trial. The facts, as shown under the pleadings on the trial, are these: The appellee on the 16th day of April, 1869, recovered before one James M. Howard, a justice of the peace in and for Eel Township, in Cass county, Indiana, a judgment against the appellants, for the sum of one hundred and twenty-one dollars and eighty-six cents and costs of suit, upon the same identical note which is the foundation of the present action; that on the 21st day of April, 1869, an execution was issued on the above judgment, and placed in the hands of a constable; that on the 4th day of May, 1869, the appellants applied to the judge of the circuit court for an injunction restraining the collection of said judgment, upon the ground that the appellants in this action and the defendants in the first action had received no notice, either actual or constructive, of the pendency of the said action; that on said day the said judge granted a temporary restraining order; that on the 15th day of May, 1869, a perpetual injunction was granted, forever enjoining the collection of said judgment, for the reasons and upon the grounds stated in the complaint of the appellants; and that said decree remains in full force, unreversed and unappealed from.

The present action was commenced on the 8th day of May, 1869.

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The defendants below and appellants here plead in bar of this action the recovery of the first judgment, and now insist that the court erred in overruling their motion for a new trial.

If the first judgment was valid, the cause of action was merged in the judgment, and another action cannot be maintained on the cause of action which was the foundation of the first judgment. If, on the other hand, the first judgment was illegal and void, the cause of action was not merged in such illegal and void judgment. An illegal and void judgment cannot bar another action upon the cause of action. As we have seen, the appellants, in their sworn complaint for an injunction, alleged that they had received no notice, either actual or constructive, of the pendency of such first action, and for this reason the court perpetually enjoined the collection of such judgment. They cannot now be heard to say that such first judgment was legal and valid, and constitutes a bar to the present action. If the appellants received no notice of the pendency of the first action, the entire proceedings were void *ab initio*, and any judgment rendered was a mere nullity, and bound no one. *Beard v. Beard*, 21 Ind. 321. A full and complete transcript of the proceedings in the first action before the justice and those in the circuit court, enjoining the collection of such judgment, are properly in the record, and clearly show that all the proceedings in the first action, before the justice, were illegal and void from the beginning, and, consequently, they are no bar to the present action. *Horner v. Doe*, 1 Ind. 130.

It is quite clear to us that the court committed no error in overruling the motion for a new trial.

The judgment is affirmed, with costs.

ON PETITION FOR A REHEARING.

BUSKIRK, J.—A rehearing is asked in this case, because we did not pass upon a question made in the assignment of errors and argued by counsel. The assignment of error is, "No cause

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of action was filed with the justice before whom this cause was originally commenced. It is shown by the record that the following cause of action was filed before the justice :

“A. D. Packard and John Spotts to William Mendenhall Dr. to amount due on note, a copy of which is filed herewith, and made a part hereof, \$125.00, damages \$25.00. Wherefore plaintiff demands judgment for \$150.00 and cost.

“JAMES M. HOWARD, Pl'ff's Att'y.”

We think that the above was a sufficient cause of action before a justice of the peace, if a copy of the note was filed therewith. The point argued here is, that the cause of action was defective, because neither the original nor a copy of the note was filed. The failure to demur does not waive the sufficiency of the facts stated in a complaint, and a party may assign for error here, that the complaint does not contain facts sufficient to constitute a cause of action. *Kesler v. Myers*, 41 Ind. 543; *Miller v. Billingsly*, 41 Ind. 489.

But we thought in the original hearing, and still think, that a party cannot assign for error, that no cause of action was filed, and under such assignment require us to pass upon the sufficiency of a cause of action that was confessedly filed before the justice.

The petition is overruled.

F. Swigart and *D. B. Anderson*, for appellant.

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Ryan v. Burkam et al., 507
5. *Same.*—Where, after attachment proceedings have been commenced, a creditor of the attachment defendant files a complaint, affidavit, and undertaking, and there is anything in the record which shows an intention to file under the original proceeding, and not to commence an independent action, such creditor will be held to have become a party to the original action. *Ib.*
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Hughes v. Osborn, 450

BANKRUPTCY.

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the district court of the United States for the district of Indiana; prayer that the suit abate.

Held, that the answer was bad on demurrer. The title to property does not pass from the bankrupt by the adjudication in bankruptcy simply; but after the appointment of an assignee, a conveyance is to be executed to him. The assignee by the fourteenth section of the bankrupt act prosecutes or defends, in his own name, all suits to which the bankrupt was a party. The answer did not allege the appointment of any assignee. So, also, under the twenty-first section, 2 G. & H. 51, the suit would not abate, but an assignee could prosecute the suit in his own name. The plea should have shown title in some one. *Sutherland v. Davis*, 26

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5. *Time of Filing*.—Where time is given within which to file a bill of exceptions, and it does not appear that a paper purporting to be a bill of exceptions was filed within the time, it will not be regarded as in the record. *James v. McConnell*, 546

BILL OF EXCHANGE.

1. A. sued B. upon the following instrument:
 "Mr." B:
 "Sir, Please pay to" A. "or order the sum of one hundred and nineteen dollars on said bill of 1¾ in. lumber, and oblige the firm of"
 [SIGNED.] C. & Co.
 "I accept." [SIGNED.] B.
- Held*, that the instrument possessed all the characteristics of a bill of exchange, and the action was by the payee against the acceptor. *Spurgin v. McPheeters*, 527
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5. *Same*.—*Consideration*.—An allegation that the holder of a bill of exchange did not part with any money or property on the faith of the bill, is not a sufficient reason why he should not recover on it. The discharge of a pre-existing debt of the drawer is sufficient. *Ib.*

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See TURNPIKE, 1, 4.

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1. *Petitioners for Street Improvement.—Good Faith of Petitioners.*—The common council of a city have a right to believe that every property owner petitioning for the improvement of a street does so in good faith, and not under a contract by which he is to be relieved of the whole or any part of his share of the cost of the improvement, whilst he is seeking to have others taxed for the whole amount of their shares under the law.
Maguire et al. v. Smock et al., 1
2. *Same.*—Any agreement or combination among parties petitioning for the improvement of a street, by which a few individuals, desirous of causing the improvement to be made, procure the signatures of others to the petition by paying, or agreeing to pay, a consideration therefor, either directly or indirectly, is a fraud on the law and contrary to public policy. *Ib.*
3. *Same.*—In an action upon an agreement to pay a consideration to procure the signatures of property owners to a petition for the improvement of a street, for those whose names were thus procured to say that they were not opposed to the improvement “in itself considered,” but that they did not feel pecuniarily able to bear the expense, and that they accepted the agreement in good faith, and without fraud, will not render the agreement valid, or enable them to enforce it. *Ib.*
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6. *Same.—Members of Common Council.—Contractor.*—If the members of the common council of a city, in passing an ordinance and letting a contract for the improvement of a street, act in good faith, under a misapprehension, they and the contractor, as well as the adjacent owner of real estate, believing the street to be within the corporate limits of the city, the contractor having like knowledge with the members of the council, they cannot be held liable for the cost of such improvement, though the place where the same is made is not within the corporate limits. *Ib.*
7. *Appeal from Precept.—Parties.*—On an appeal from a precept issued to enforce the collection of an assessment for the improvement of a street, the contractor who did the work, and for whose benefit the precept issued, is the proper party plaintiff.
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8. *Same.—Appeal Bond.*—The appeal bond in such case should be made payable to the contractor, and not to the city. *Ib.*

9. *Same.—Judgment.—Amendment.—Complaint.*—Where, in such an action, the city appears as the party plaintiff, and the cause is allowed to proceed to final judgment without objection, and the court in the judgment orders the money when collected to be paid to the contractor, the judgment will be substantially a judgment in favor of the contractor, and the Supreme Court will deem the complaint to have been amended by making him the plaintiff. *Ib.*
10. *Aid to Railroad Company.—Petition.—Remonstrance.*—Where a petition asking a city to make a donation in aid of the construction of a railroad has been presented to the common council and referred to a committee of the council, persons who signed the petition may, by a remonstrance, withdraw their names from the petition while the same is in the hands of the committee; and if, after such withdrawal, there is not a sufficient number of petitioners asking the donation, the council cannot make the same.
Noble v. The City of Vincennes, 125
11. *Contract for Street Improvement.—Extension of Time.—Penalty.*—Where a contract for a street improvement provided, that if the work should not be done within a time specified, and the contractor should desire an extension of time, such extension should only be granted on condition that five *per centum* per month should be deducted from the assessments for all work done after such extension, the deduction to operate for the benefit of the property holders;
Held, that the deduction provided for was in the nature of a penalty, which the common council might enforce or not in its discretion.
Held, also, that the penalty was only to attach on condition that the contractor desired an extension of time. *Gulick v. Connely, 134*
12. *Appeal from Precept.—Issues to be Tried.*—On an appeal from a precept issued for the collection of an assessment for a street improvement, the issues to be tried are, whether the proceedings of the officers subsequent to the order directing the work to be done were regular; whether a contract was made; whether the work was done, in whole or in part, according to the contract; and whether the estimate has been properly made thereon. *Ib.*
13. *Improvement of Street.—Acceptance of Work.*—The acceptance by the city authorities of work done under a contract for a street improvement is only *prima facie* evidence that the work has been done in substantial compliance with the terms of the contract. *Ib.*
14. *Defective Bridge.—Liability for Injury to Persons.—Negligence.—Pleading.*—Where the complaint in an action against a city alleged that a certain bridge in said city was out of repair, and the planking loose, etc., and that after the plaintiff had driven his horses upon the bridge with a loaded wagon, and was using due and reasonable care on his part to draw forward said load, the horses were injured through the defects in the bridge;
Held, that the complaint was bad on demurrer, because its allegations did not show that the plaintiff used due care in driving upon the bridge, or that he was ignorant of the condition of the bridge, and because there was no general averment that the injury occurred without his fault. If the plaintiff knew of the true condition of the bridge when he drove upon it, there could be no recovery.
Held, also, that the negligence of the city, in not repairing the bridge, did not relieve the plaintiff from the duty of using due care.
Riest v. The City of Goshen, 339
15. *Motion to Make New Parties.—Street Improvement.*—A motion by the defendant in an action on a due-bill to make the mayor and common council of a city parties plaintiffs, also, on the ground that the due-bill in suit was executed for a street improvement in said city, and given to the contractor therefor, and that three years after the same was due and unpaid, the city had issued a precept to collect the same, was properly overruled.
McDonald v. Yeager, 388
16. *Obstructing Alley.*—If dirt is dug up and removed from an alley in a city, thus rendering the alley impassable and causing injury to adjoining prop-

erty, and no order or ordinance of the city has authorized the same, and it is not done under a contract with the city, an action by an adjoining property owner will lie, for damages sustained by reason of such removal.

Musselman v. Manly, 462

CLERK.

See ELECTION, 1; PRACTICE, 3.

CONSIDERATION.

● See BILL OF EXCHANGE, 3, 5; CONTRACT, 4; PRINCIPAL AND SURETY; VENDOR AND PURCHASER, 5.

A promise to one to pay him, if he will do what he is already bound to do by law or by contract, is without consideration, and the law will not compel the promisor to perform his agreement.

Ritenour v. Mathews, 7

CONSTITUTIONAL LAW.

See RAILROAD, 7.

1. *Statutes.—Validity.*—An act of the legislature, duly passed and approved by the Governor, is not to be declared invalid, unless it be clearly, palpably, and plainly in conflict with the constitution. *Groesch v. The State*, 547
2. *Liquor Law.*—The act of February 27th, 1873, to regulate the sale of intoxicating liquors (Acts 1873, p. 151), does not violate the provisions of section one of article four of the constitution, by committing legislative power to the people. *Id.*
3. *Same.*—Neither does said act violate the provisions of the constitution by vesting administrative power in the people. *Id.*
4. *Same.*—Nor does it violate the provisions of the constitution prohibiting the enactment of laws local in their nature. *Id.*
5. *Uniform Operation of Laws.*—The constitution does not require that the operation of laws throughout the State shall be uniform, in any other sense than that their operation shall be the same in all parts of the State under the same circumstances and conditions. *Id.*

CONTINUANCE.

See NEW TRIAL, 8.

1. *Affidavit for Continuance.—Illness of Witness.—Attachment.*—Where, in a criminal action, an affidavit for a continuance shows that witnesses, who have been duly summoned, are prevented from attending court by sickness, it is proper to refuse to issue an attachment for them. The fact of the illness of the witnesses may be proved by the affidavit of the defendant or of any one else having knowledge of the matter. *Cutler v. The State*, 244
2. *Same.—Truth of Facts Stated.—Appeal.*—Where the defendant in a criminal action, moving for a continuance on account of the absence of witnesses, shows the competency of the witnesses, the materiality of their testimony, that they have been duly and legally summoned, and the other facts specially required by the statute, he is entitled to a continuance without regard to the cause of their absence. The court must decide the motion for a continuance upon the facts stated in the affidavit alone, accepting the same as true; and on appeal this court will not look at the evidence given on the trial, but to the affidavit alone. *Id.*
3. *Same.—Diligence.*—A person was indicted in June, and an application was made in September of the next year for a continuance of the case on the ground that a material witness was absent, and the statement in the defendant's affidavit as to the residence of the witness and the diligence used to obtain his testimony was as follows: "That he believes the said witness resides in Miami county, Indiana; that he caused a subpoena to be issued

and placed in the hands of a special messenger, who, under the order of this court, made an effort to serve the summons, but said summons has been returned not found;” it not being stated when the subpoena was issued, and it not appearing when the defendant was arrested.

Held, that the affidavit was not sufficient to entitle the defendant to a continuance.
Miller v. The State, 544

CONTRACT.

See CONSIDERATION; CONVEYANCE; INTOXICATION; VENDOR AND PURCHASER, 4, 5.

1. *Bond.—Consideration.—Restraint of Trade.*—Suit for breach of a bond conditioned that the defendant would not sell intoxicating liquor of any kind within a certain town or a certain township, for the term of one year. The expressed consideration was, that the obligee had given a like bond to the defendant.

Held, that the obligations of the parties must be regarded as independent, and that the execution of each instrument was an ample and valid consideration for the execution of the other; the execution and not the performance being the consideration.

Held, also, that the bond was not void as being in restraint of trade and therefore against public policy.
McAlister v. Howell, 15

2. *Same.—Instructions.—Intention of Parties.*—The court charged the jury, in substance, that if the defendant had violated his agreement, the plaintiff was entitled to recover so far as any defence that could be shown under the general denial was concerned, “no matter for what purpose, or under what circumstances the defendant sold the liquor.” The court also left it to the jury to determine as a question of fact (the defendant having filed an answer to that effect), whether it was the intention of the parties, and understood between them at the time the bonds were executed, that the defendant might sell whiskey, etc., as a medicine, and if they should so find, and that defendant had not sold for any other purpose, and only “to persons laboring under some disease, which in the opinion of a competent physician required for the cure of such disease the liquors thus sold by the defendant,” he was entitled to recover. The evidence proved that the defendant was a physician.

Held, that these charges were not liable to objection on the part of the defendant.
Ib.

3. *Same.—Parol Agreement.—Written Contract.*—A charge asked by the defendant, which undertook to control the written contract by a contemporaneous parol agreement inconsistent with the terms of the writing, was properly refused.
Ib.

4. *Donation to Railroad Company.—Change in Line of Road.—Construction of Contract.*—In a suit upon a contract to donate and pay to The Indianapolis and Vincennes Railroad Company a certain amount of money, when the railroad company should have completed her railroad through Morgan county and have the same ready for the running of cars, “provided, always, that said railroad be located and made as nearly as practicable on the grade of The Indianapolis branch of the New Albany and Salem Railroad from Indianapolis to Gosport, making Mooresville, Brooklyn, Centerton, and Paragon points;”

Held (Downey, J., dissenting), that when the railroad company had built its road through Morgan county and completed it for the running of cars through that county, and had made Mooresville, Brooklyn, Centerton, and Paragon points on the road, the defendant was liable to pay the amount agreed to be donated, and it was not necessary that the old grade of the branch road should have been occupied further than to make these places points.

Branham et al. v. Record, 181

5. *Wilful Ignorance.—Relief.*—Ignorance is considered wilful when a person neglects the means of information which ordinary prudence would suggest; and ignorance of a man's own rights conferred by an instrument actually in his possession or power, when the other party is innocent of concealment, or of any conduct contributing to keep him ignorant of its contents, will not excuse the performance of the conditions imposed on the person claiming under the instrument.

Thiebaud et al. v. First National Bank of Vevay, 212

6. *Implied Promise.—Work and Labor.—Uncle and Niece.*—A girl, upon the death of her mother, was turned away from home by her father, at the age of fourteen, and at the suggestion of her aunt and her grandmother she went to live with an uncle and aunt, with whom she remained until she was twenty-five years of age; when, being engaged to be married, she privately left, and was afterward married; and she subsequently brought suit against said uncle for work and labor. It was not claimed that any express contract existed, and it appeared that she was kindly treated and provided for in a better manner than she would have been if she had merely received ordinary wages.

Held, that she was not entitled to recover for her services.

Hays v. McConnell, 285

7. *Wife and Child.—Liability for Board.*—In an action to recover on an account for boarding the wife and children of the defendant, it appeared in evidence that the plaintiff boarded said wife, who was his sister-in-law, and said children, for a number of weeks, at his home, having contracted therefor with her, and having no knowledge of her separation from her said husband when she engaged board; that said husband and father, during the time of said boarding, resided at a distant part of the State; and that he had a home for his said wife and children and provided for them, and had the home and provisions for them during the time of said boarding, which they did not need, and which was not contracted for or authorized by him.

Held, that these facts did not render the defendant liable for the board of his wife or his children.

Wallace v. Ellis, 582

CONVEYANCE.

Statutory Form.—Covenants.—A warranty deed in the statutory form is a conveyance in fee simple to the grantee, his heirs, and assigns, with covenants from the grantor and his heirs and personal representatives that he is lawfully seized of the premises, has good right to convey the same, and guarantees the quiet possession thereof, that the same are free from all incumbrances, and that he will warrant and defend the title against all lawful claims.

Coleman v. Lyman, 289

CORPORATION.

See CITY; DRAINING ASSOCIATION; INSURANCE; PROMISSORY NOTE, 6; RAILROAD; TURNPIKE.

COSTS.

1. *Appeal from Justice of the Peace.*—On appeal from a justice of the peace to the circuit court or court of common pleas, where the plaintiff has failed to recover before the justice, and again fails on appeal, the defendant is entitled to judgment against the plaintiff for full costs.

Scary v. Brusk, 172

2. *Security for.—Non-resident.*—An action commenced by a non-resident will not be dismissed for want of security for costs, if the plaintiff, upon being ordered to do so, files an undertaking for the same.

Hughes v. Osborn, 450

3. *Bill of Exceptions.*—To present to the Supreme Court any question arising upon a motion to tax costs, a bill of exceptions must have been filed.

The State v. Saxon, 484

COUNTER-CLAIM.

See DEMURRER; PLEADING, 6 to 10.

COUNTY AUDITOR.

See ELECTION, 1.

Salary in Lieu of Allowances.—A board of county commissioners may not by its order, made with the assent of the county auditor and upon his agreement with the board, allow him an annual salary, payable quarterly out of the county treasury, in lieu of the specific allowances which the board is authorized to make him for his services; and the fact that such an agreement and order had been made and acted upon during the continuance of an auditor in office, and that final settlement and payment had been made under such order and agreement at the expiration of his term of office, it was *held*, constituted no defence to a suit by the auditor against the board, to recover for his services, though the amount paid him under the order might be set off against his claim.

Keightley v. Board of Comm'rs of Putnam Co., 576

COUNTY CLERK.

See ELECTION, 1; PRACTICE, 3.

COUNTY COMMISSIONERS.

See COUNTY AUDITOR; ELECTION, 3.

Allowance of Claims.—Judicial Decision.—Conclusiveness.—The board of commissioners, in acting upon claims against the county, act in a judicial capacity, and their decisions are conclusive and binding alike upon the county and the claimant, unless appealed from, or unless an independent action is brought against the county when the claim has been disallowed.

Board of Comm'rs of Warren Co. v. Gregory, 32

COURT OF COMMON PLEAS.

See INFORMATION; JURISDICTION, 1, 2; WILL, 4, 5, 9.

CRIMINAL CIRCUIT COURT.

See CRIMINAL LAW, 3, 4.

1. *Grand Jury.—Sessions of.*—The law does not provide for a grand jury for a criminal court for each month during which, or any part of which, the court may be in session; but it does provide for a grand jury for each term; and if the court, at the same term, can legally be in session in two or more months, the same grand jury may sit in each month.

Harper v. The State, 405

2. *Same.—Floyd County.*—The criminal court in Floyd county can, under the act organizing that court (3 Ind. Stat. 178, sec. 1) and the act of Feb. 12th, 1855 (2 G. & H. 11), adjourn from a regular term of said court to some other certain time, and if such time is in a month within which the grand jury has not already been in session ten days, the grand jury may legally meet in connection with the court, and find and return indictments. *Ib.*

CRIMINAL LAW.

See CONTINUANCE, 1, 2, 3; CRIMINAL CIRCUIT COURT, GRAND JURY; JURY; LIQUOR LAW; SUPREME COURT, 19.

1. *Pleading.—Former Conviction.*—In all criminal prosecutions the defendant, under an oral plea of the general issue, may show a former conviction for the same offence.

Lee v. The State, 152

2. *Nuisance.—Evidence.*—In a prosecution for the erection and maintenance of a nuisance, where it is alleged that the nuisance is located upon a particular tract of land, the State is bound to prove the location as alleged, or fail in the prosecution. *Wertz v. The State*, 168
3. *Appeal from Justice of the Peace.—Criminal Circuit Court.*—An appeal will lie from a conviction for an assault and battery before a justice of the peace to a criminal circuit court, and such court has jurisdiction to try such cause on appeal. *Wachstetter v. The State*, 166
4. *Same.—Practice.*—On an appeal from a conviction for an assault and battery before a justice to a criminal circuit court, the case is properly tried upon the original affidavit, and no indictment is necessary. *Ib.*
5. *Riot.—Unlawful Act.*—Where an offence consists in three or more persons doing an act in a violent and tumultuous manner, it is not necessary, in order to sustain a prosecution for such an offence, that the act done should be unlawful. Although the word violent be not used in the affidavit or information, in describing the offence, if the allegations show that the act was done violently, it will be sufficient. *Kiphart et al. v. The State*, 273
6. *Practice.—Bill of Exceptions.*—Bills of exceptions in a criminal action must be filed within the term, and the record must show the fact of the filing and the time thereof. *Ib.*
7. *Indictment for Desecration of Sabbath.—Indefiniteness.*—An indictment for hunting on Sunday, which alleged that, "on or about the 1st day of October, A. D. 1871," the defendant, etc., "said 1st day of October, 1871, being then and there the first day of the week, commonly called Sunday," was bad, for not being definite as to the time of the offence. *The State v. Land*, 311
8. *Indictment.—Nuisance.*—The keeping of a house where tippling and whoring are carried on is not a nuisance, unless the public is affected by it; and an indictment therefore must show such facts as establish this consequence. *Mains v. The State*, 327
9. *Motion to Quash Indictment.*—A motion to quash an indictment cannot prevail unless the defect is apparent on the face of the indictment. *Bell v. The State*, 335
10. *Indictment.—Larceny of Property of A. and of B.*—An indictment may charge a larceny of A.'s property in one count, and of B.'s in another count, at the same time and place, where the character of the property is such that it may have constituted one offence and a conviction of one might be a bar as to the other. *Ib.*
11. *Omission in Verdict.—Motion for New Trial.*—The question as to an omission in a verdict to fix the disqualification of holding an office of trust and profit can not be raised by a motion for a new trial. *Ib.*
12. *Evidence.—Subsequent Conduct of Party Jointly Indicted.*—When A. was on trial separately, under a joint indictment against him and B., for larceny, it was error in the court to permit the State to prove the conduct of B., subsequent to the alleged commission of the larceny described in the indictment, at a different place, and while the defendant was not present. *O'Neil v. The State*, 346
13. *Placing Obstruction on Railroad.—Evidence.*—Under an indictment for maliciously placing pieces of timber upon a railroad track, it is not necessary that the proof should correspond with the allegation as to the number of pieces placed upon the track. One piece calculated to obstruct passing trains is sufficient to constitute the offence. *Allison v. The State*, 354
14. *Same.—Presumption.*—On the trial of such an indictment, an instruction, that, "if the proof shows conclusively that the defendant placed the timber upon the track of the railroad in question, in such a manner as to obstruct the passage of trains of cars over said road, the presumption is that the act was wilfully and maliciously done," it was held, was erroneous. *Ib.*

15. *Keeping Disorderly House.—Information.*—Where an information for keeping a disorderly house followed more closely the language of section 13 of the temperance act of 1859 than the language of other acts, it was treated as under the temperance law of 1859 rather than other acts; nor was it necessary that the information should allege that the defendant was keeping a licensed house under that act, or that liquor sold by the defendant created the disturbance, it being sufficient if he suffered the liquor to be sold in his house.
Joseph v. The State, 370
16. *Evidence.—Instruction.—Alibi.*—In a criminal action, the charge to the jury, that under evidence of an *alibi*, "you should carefully examine, in order to ascertain whether, even if an absence be shown, that absence at another place was so complete and of such a character in regard to time and location, as to render the defendant's presence impossible at the time and place of the commission of the alleged crime," was held to be erroneous. If the jury believed the defendant to have been at another place at a given time, and if his being there then created a reasonable doubt of his presence at the place of the crime, at the time of its commission, he should have been acquitted.
Adams v. The State, 373
17. *Indictment.—Signature of Prosecuting Attorney.—Return of Indictment by Grand Jury.*—Where an indictment was not signed by the prosecuting attorney, and the record did not show that it was returned by the grand jury;
Held, that a motion to quash should have been sustained.
The State v. Heacock, 393
18. *Former Acquittal.—Special Plea.*—To an indictment for murder in the first degree for the killing of A., the defendant entered a special plea in bar, wherein she alleged that she had been indicted for murder in the first degree for killing one B.; that she had been tried by a jury upon said indictment for the killing of B., after having taken issue thereon by a plea of not guilty as charged therein; and that upon such trial she was found guilty of murder in the second degree, and sentenced to the state prison for life; by which finding and judgment she was acquitted of the charge of murder in the first degree as charged in said indictment; and the crime charged in said indictment, for which she was tried and acquitted, "was and is identical in all its parts, incidents, and circumstances, with the crime charged in the indictment for the killing of" A.; "that the evidence whereby alone the State will attempt to prove the indictment in this cause is the same and nowise different from that employed and produced upon the trial of the indictment on which she was acquitted of murder in the first degree; and this she is ready to verify," etc.
Held, that the plea was good.
Held, also, that the plea stated in effect that the same act caused the death of A. and B., and if the same act resulted in the death of both, there was but one crime.
Held, also, that it was not necessary that the plea should show that A. and B. were one and the same person.
Clem v. The State, 420
19. *Murder.—Acquittal.*—If upon an indictment for murder in the first degree, the defendant is found guilty of an inferior grade of homicide, without saying anything as to the higher grade, the finding is by implication an acquittal of the higher grade.
Id.
20. *Same.—Killing of two Persons by the Same Act.*—Where two or more persons are killed by the same act, the State cannot indict the guilty party for killing one of the persons and after a conviction or acquittal indict him for killing the other.
Id.
21. *Pleading.—Plea of Not Guilty.—Special Plea.*—The privilege given by statute (2 G. & H. 413, sec. 97), that in all criminal prosecutions the defendant may plead the general issue orally, and under it every matter of defence may be proved, does not take away from him the right to plead specially any defence which before that enactment might have been specially pleaded.
Id.

22. *Same.—Special Plea in Bar.—Trial.*—A defendant in a criminal prosecution may plead specially a former acquittal or a former conviction in bar, and have the issue or issues joined on such plea tried separately and apart from the question of the guilt or innocence of the crime charged in the pending indictment. *Ib.*
23. *Same.*—If the issue or issues joined upon a plea of former acquittal or conviction are found against the defendant, he may still enter a plea of not guilty. *Ib.*
24. *Same.—Judgment.*—The judgment upon a plea of former acquittal or conviction, when the issues have been found against the defendant, is that he answer over. *Ib.*
25. *Same.*—Upon the general issue only can a defendant in a criminal prosecution be found guilty and subjected to the penalty of the law. *Ib.*
26. *Same.*—It is optional with a defendant in a criminal prosecution whether he will plead a former acquittal or conviction specially, or give the same in evidence under the plea of not guilty. *Ib.*
27. *Same.—Practice.—Demurrer.*—The rule that it is not an available error that a demurrer has been sustained to a pleading, when there is another pleading under which the same evidence is admissible, is not applicable in criminal cases. *Ib.*
28. *Same.—Demurrer.*—In determining the sufficiency of a plea of former acquittal or conviction, to which a demurrer has been sustained, the court cannot regard the evidence that was afterward given on the trial of the cause upon a plea of not guilty. *Ib.*
29. *Instructions.—Exculpatory Facts.*—On the trial of a criminal cause, it was error to instruct the jury, that if there were other facts not before them, which were exculpatory in their character, and they could have been proved by the defendant but were not, the jury might consider such failure with the other circumstances offered to show the guilt of the defendant. *Ib.*
30. *Same.*—The jury were instructed as follows: "Remember that you are each responsible for the verdict you shall render, not forgetting, however, that no man can safely consider himself infallible, that no number of minds can agree upon a multitude of facts, such as this case presents, without some yielding of the judgment of individuals upon the evidence, some deference to the opinion of others, without what some might call compromise of different views. No man who is unwilling to do this within reasonable limits, and without a sacrifice of conscience, ought to have a place in the jury box or be a member of any deliberative body."
Held, where the indictment was for murder in the first degree, and the evidence was all circumstantial and tended to prove murder in the first degree only, and there was a verdict of guilty of murder in the second degree, with a recommendation to executive clemency, that the charge was erroneous. *Ib.*
31. *New Trial.—Effect of Granting a New Trial.*—The legal effect of granting the appellant in this cause a new trial must be decided by the court below before it can properly be passed upon by the Supreme Court. *Ib.*
32. *Statute Construed.—Technical Error.*—To deprive a defendant in a criminal prosecution of the right to plead a former acquittal or conviction by a special plea, and to have the issue thus tendered tried first, and, if found against him, to have another jury try the issue on a plea of not guilty, is not a technical error within the meaning of sec. 160, 2 G. & H. 427. *Ib.*
33. *Instructions.—Effect of.*—Although the jury in criminal causes are made the judges of the law as well as of the facts, the charge of the court is presumed to control their minds to some extent; and when the court has misdirected the jury in a material matter of law, such misdirection is a ground for a new trial. *Ib.*
34. *Same.*—Where, from the whole case, it appears that the jury might have ren-

dered a different verdict, it may well be considered that an erroneous instruction leading to the verdict influenced them, and is good ground for a new trial. *Ib.*

35. *Appeal by State.—Assignment of Error.—Reservation of "Point of Law."* When the State appeals in a criminal action from the judgment below, and the only question there reserved is upon the overruling of a motion for a new trial, and such ruling is not assigned as error, the appeal is not within section 119 of the criminal code, 2 G. & H. 420. Whether such exception to the overruling of the motion for a new trial constitutes the reservation of a "point of law," was not decided. *The State v. Ensey, 480*

36. *Venue.—Judicial Knowledge.—Presumption.*—Where the proof under an indictment for grand larceny was, that the goods were stolen at Plainfield, Hendricks county, and brought into Marion county, this court took judicial notice that Plainfield is in Hendricks county, Indiana, and presumed that the county intended by the witness was Hendricks county in this State. *Turbeville v. The State, 490*

37. *Evidence.—Statements.—Immaterial.*—On the trial of an indictment, evidence of statements made in the absence of the defendant, by one not connected with the defendant by the evidence, is inadmissible, but where the evidence is harmless, or favorable to the defendant, a judgment against him will not be reversed on account of the admission of such evidence. *Ib.*

38. *Larceny.—Finding Stolen Goods.—Joint Possession of Place.—Evidence.*—Where the only evidence connecting the defendant with the larceny was the finding of part of the recently stolen goods in a room jointly occupied by him and another person, and more particularly under the control of the latter, who was not charged with the larceny, the evidence was not sufficient to justify a conviction. *Ib.*

39. *Jury.—Discharge of.—Misconduct.—Jeopardy.*—A jury, which had been impanelled and sworn to try an indictment for murder, having heard the evidence and having retired in charge of a bailiff to deliberate upon their verdict, and having returned into court, it was shown to the court that during the adjournment of the court and after the commencement of the trial, the bailiff, in disobedience of the order of the court, instead of taking the jury to a room, took them into the public square, and left them, and went to the saloon of the defendant, who was out on bail, and there procured from his barkeeper a can of beer, and gave it to the jury, who drank it, and that the bailiff so gave them said beer without the knowledge or consent of the court. Thereupon, the court, over the defendant's objection, discharged the jury.

Held, that the discharge of the jury was not necessary.

Held, also, that having so discharged the jury, there was no error in then discharging the defendant. *The State v. Leunig, 541*

40. *Indictment.—Assault and Battery with Intent to Murder.*—An indictment for assault and battery with intent to murder charged that the defendant "feloniously, purposely, and with premeditated malice," did "beat, strike, kick, stamp, trample upon, and wound, with intent, then," etc.

Held, that the indictment sufficiently charged an assault and battery.

Sloan v. The State, 570

41. *Same.*—In an indictment for an assault and battery, it is not necessary that all the words "rude," "insolent," "angry," should be used; if one or more of them be used, or the equivalent of one or more of them, it is sufficient. *Ib.*

DAMAGES.

See SUPREME COURT, 27.

Accrued.—A plaintiff in an action based on a contract can only recover for such sum as may have been due at the time the action was brought; and in an action founded in tort, for such damages as had accrued at the commencement of the action. *Musselman v. Manly, 462*

DECEDENTS' ESTATES.

See WITNESS, 3.

1. *Claim in Favor of Administrator.*—An administrator is not authorized by the code of 1852 or by subsequent legislation to file a claim in his own favor against the estate which he administers; but section 802, p. 336, 2 G. & H. continues in force sec. 218, p. 526, of the Revised Statutes of 1843, which provides for the filing of such claims in the probate court; and when the court of common pleas became the successor of the probate court, it became the court for the adjudication of such claims.
Chidester, Adm'r, v. Chidester, 469
2. *Claim.—Jurisdiction.*—To confer jurisdiction over the subject of the action, a claim against the estate of a decedent must be filed, placed upon the appearance docket, and, if not allowed, must be transferred to the issue docket; and, upon demurrer for want of jurisdiction, the record must show that such steps have been taken. *Stanford et al. v. Stanford et al., 489*
3. *Same.—Other Defendants.*—Where another person is a necessary defendant with the administrator or executor, the claim need not be filed against the estate, but an ordinary action may be brought against the administrator and such other person. *Ib.*
4. *Same.—Parties.*—To an ordinary claim against an estate, neither the heirs nor the guardians of the heirs are necessary parties defendants. *Ib.*
5. *Same.*—The same person cannot act in the double capacity of plaintiff, urging his own claim against an estate, and of defendant, making a defence to the same. In such case the court should appoint some person to defend for the estate. *Ib.*

DELINQUENT LIST.

1. *Statute.—Assessment Law.—Printing of Delinquent List.—Compensation.*—Sections 142 and 143 of the assessment law, as amended May 31st, 1861, require that the compensation for the publication of the delinquent list shall be made on the basis of tabular description, as contained in the duplicate, and have no reference to the number of columns in the newspaper.
Board of Comm'rs of Warren Co. v. Gregory, 32
2. *Excessive Payment.—Voluntary.*—Where the commissioners have allowed an excessive claim for printing the list, there being no mistake of fact, the list being before them, and it being their duty to know the fact, the money cannot be recovered back. *Ib.*

DEMURRER.

See APPEARANCE, 1; CRIMINAL LAW, 27, 28; ELECTION, 2; PARTIES; PLEADING, 9.

To Evidence. See PRACTICE, 8 to 12.

Cause.—That a pleading does not "state facts sufficient to bar the action," and that it does not "state facts enough for a counter-claim," are not grounds of demurrer known to the statute. *Campbell et al. v. Routt, Adm'r, 410*

DEPARTURE.

See PLEADING, 13, 14.

DEPOSITION.

1. *Commencement of Trial.*—With reference to the statute fixing the time when objections to depositions must be made (sec. 266 of the code), the swearing of the jury is the commencement of the trial. *Glenn v. Clore, 60*
2. *Motion to Suppress.*—A court cannot suppress a deposition after the jury is sworn, unless the objection relate to some matter not disclosed in the deposition. *Ib.*

3. *Proceedings before Mayor.*—Depositions of witnesses may be taken out of the State, in an action pending before the mayor of a city.

Reeves v. Allen, 359

DESCENT.

1. *Widow.—Statute Construed.*—Under section 27 of the statute of descents (1 G. & H. 296), the surviving wife does not take by descent as an heir, but by virtue of her marital relation. *Brannon et al. v. May*, 92
2. *Same.—Claim under Unrecorded Deed.*—A widow claiming under an unrecorded deed of conveyance of real estate executed to her husband will hold one-third of the real estate against subsequent purchasers for value who had notice of the unrecorded conveyance to her husband. *Ib.*

DISORDERLY HOUSE.

See CRIMINAL LAW, 15.

DOWER.

- Assignment of.—Demand.—Time of.*—Under the Statute of 1843, p. 804, sec. 67, the persons entitled to the freehold were not liable to an action for the assignment of dower, until thirty days after demand for such assignment. Accordingly, where the evidence failed to show when the demand was made, there could be no recovery. *Hasselman et al. v. Allen et al.*, 257

DRAINING ASSOCIATION.

1. *Assessment.—Pleading.*—An action to enforce the collection of an assessment for the construction of a drain is based upon the assessment, and not upon the articles of association. The filing of a copy of the articles does not make them a part of the complaint. *Dobson v. The Duck Pond Ditching Ass'n*, 312
2. *Same.—Filing Bond with Clerk.—Practice.*—If it is a valid objection that a bond has not been filed with the clerk of the circuit court by the association, it is remedied by filing one on the trial. *Ib.*
3. *Appraisers.—Appeal.—Practice.—Demurrer.*—An order of the board of county commissioners appointing three appraisers to view a proposed ditch and assess benefits and damages, need not show affirmatively that the persons so appointed are "disinterested freeholders of the county in which the application is made and not of kin to any of the parties." The question as to their having such qualifications may arise on the trial on appeal, but cannot be raised by demurrer. *Kellogg v. Price et al.*, 360
4. *Appeal.—Practice.—Pleading.—Jury.*—Upon an appeal there should be no demurrers to the transcript, no answers, and no replies. Nor, of necessity, should there be a re-appraisement, though the court would, perhaps, when necessary, have power to appoint new appraisers or re-appoint the old, and generally to examine the sufficiency and regularity of the steps taken. If they have been sufficient and regular, the proceedings should be affirmed, if not, reversed and corrected, and in a proper case a jury may be had on demand of either party. *Ib.*

ELECTION.

1. *Contest of Election.—Affidavit.—County Auditor.*—The county auditor has authority to administer the oath as to the truth of the matters stated as grounds for contesting an election to the office of county clerk. *Curry v. Miller*, 320
2. *Demurrer.—Sufficiency of Affidavit.*—A demurrer assigning a want of sufficient facts as causes stated for contesting an election presents no question as to the sufficiency of the affidavit. *Ib.*
3. *Jurisdiction.—Erroneous Decision.*—The power of the board of commissioners to hear and determine upon the sufficiency of the affidavit filed to contest an election constitutes jurisdiction. If the decision be wrong, it is simply erroneous, and not void. *Ib.*

ESTOPPEL.

See PROMISSORY NOTE, 5; TURNPIKE, 2, 3; WILLIAMS v. THE GREENSEURGH, ETC., Co., 171.

1. *Obstruction of Highway*.—The widow and administrator of A. sold to B. certain real estate, of which A. was seized in fee at his death, over which ran a public street of a town. C., who owned and had erected buildings upon certain other real estate adjoining said street, was present and bid at the sale, and gave no notice of the existence of the street. B., claiming to own the land over which the street ran, obstructed the street, to the damage of C. and the public.

Held, that C. was not estopped by these facts to sue for the damage so sustained by him. The existence of the public highway was or might have been as open to the knowledge of B. as to that of C. *Foster v. Albert*, 40

2. *Appeal*.—A party cannot appeal, and have all the benefit to be derived from the appeal, and then be heard to say that because of some informality in his proceedings to obtain an appeal, he did not in fact appeal.

Wachstetter v. The State, 166

EVIDENCE.

See BILL OF EXCHANGE, 2; CRIMINAL LAW, 2, 12, 13, 16, 37, 38; DEPOSITION; HUSBAND AND WIFE, 3; INSTRUCTIONS TO JURY, 5; LIQUOR LAW, 2; NEW TRIAL, 3, 4, 5, 12; PRACTICE, 4, 8 to 12; PROMISSORY NOTE, 3; STATUTE OF LIMITATIONS, 2, 3, 5; WILL, 6, 7; WITNESS.

1. *Practice*.—Where a party against whom incompetent or inadmissible evidence has been admitted objected at the proper time and in the proper manner, and excepted to its admission, he need not afterward move to strike it out, in order to have the benefit of his exception. *Glenn v. Clore*, 60
2. *Instruction*.—*Illegal Evidence*.—Where an instruction to a jury does not withdraw illegal evidence or direct the jury to disregard it, though its legal import may be that the evidence is incompetent or insufficient, the instruction does not cure the error in admitting the evidence. *Ib.*
3. *Execution of Written Instrument*.—By failing to deny under oath the execution of a written instrument, which is the foundation of a suit, and a copy of which is filed with the complaint, proof of its execution is dispensed with, but it is incumbent on the plaintiff to produce, on the trial, and give in evidence, the instrument described in the complaint, to entitle him to recover. *Lucas v. Smith et al.*, 103
4. *Variance and Amendment*.—Where an instrument of writing sued upon is described in the complaint as a contract to pay one hundred dollars, and the contract produced at the trial, and given in evidence, is an agreement to pay one dollar, the complaint will be considered, in the Supreme Court, as amended so as to conform to the proof. *Ib.*
5. *Same*.—*Judgment*.—Where a complaint is upon a contract, described as an agreement to pay one hundred dollars, and there is no averment of any mistake as to the amount agreed to be paid, or any evidence other than the contract, and the contract in evidence is an agreement to pay one dollar, it is error to render judgment for an amount exceeding the sum named in the contract. *Ib.*
6. *Cumulative Evidence*.—*Definition*.—Cumulative evidence is of the same kind and to the same point as that already or previously given. *Zouker v. Wiest*, 169
7. *Cross-Examination of Plaintiff*.—Where the cause assigned in a motion for a new trial was, that the court erred in refusing to permit a question to be asked the plaintiff on his cross-examination, and there was no evidence showing that the question was as to matters testified to by the witness on his examination in chief;

Held, that the overruling of the motion was not error.

The I., B., & W. R. W. Co. v. Ferguson, 243

8. *Of Matters Occurring After Complaint.*—Evidence tending to prove matters that occurred subsequent to the filing of the complaint should be excluded.
Musselman v. Manly, 462

EXECUTION.

See PLEADING, 5.

1. *Execution Against Joint Debtors.*—When a judgment has been rendered against several persons, none of them being sureties, and an execution is issued upon the judgment, the sheriff is not bound to exhaust the personal property of all the defendants, before levying upon the real estate of any of them.
Drake v. Murphy et al., 82
2. *Same.*—When any one of such judgment debtors has no personal property subject to levy, the sheriff may levy upon his real estate.
Ib.
3. *Sheriff.*—A sheriff is not bound by the provisions of section 441 of the code to go to the party whose property is to be levied upon, to get him to exercise the right of designating what property is to be levied upon, where he possesses such right.
Ib.
4. *Excessive Levy.*—Where real estate is levied upon, and it can be divided, it is the duty of the sheriff to sell only so much as may be necessary to satisfy the execution, and a levy upon a larger tract or parcel than is necessary, and the advertisement thereof for sale cannot be objected to on the ground of an unreasonable or excessive levy.
Ib.
5. *Growing Crop.—Lien.*—Where an execution was issued upon a judgment on the 31st day of May, and, on the 25th day of the next July, the execution defendant sold his interest in a field of corn growing upon his lands, which had been planted and cultivated by tenants, and of which, by contracts with the tenants, he was to receive a portion when the corn matured in the field at cutting-up time, but each party was to save and take care of his own share, and the sheriff levied upon the interest of the execution defendant on the 4th day of August thereafter;
Held, that the corn was subject to execution and sale as the property of the execution defendant; that the execution was a lien thereon from the time it came into the hands of the sheriff, and the subsequent sale of the corn by the execution defendant in no manner impaired such lien.
Lindley v. Kelley, 294
6. *Return.—Additional Levy.*—Where there has been a levy upon real property under several executions, the statement in a return by the sheriff, as a reason for an additional levy on personal property, that he regarded the real property previously levied upon as insufficient to satisfy the execution, is no evidence of such being the fact. The return by the officer on the execution is evidence between the parties, only when the facts stated are official acts to be done in the usual course of proceeding. Matters of opinion or excuses for failure to perform a duty cannot be thus proved.
Ib.
7. *Satisfaction.—Presumption.*—In this State, a levy upon real estate of sufficient value to pay the judgment creates a presumption of satisfaction, and there exists no distinction between the effect of a levy upon real estate and that of a levy upon personal property. This presumption of satisfaction does not arise from a mere levy, but from proof that the property levied upon is sufficient to satisfy the execution.
Ib.

EXECUTOR AND ADMINISTRATOR.

See DECEDENTS' ESTATES.

FRAUD.

See HUSBAND AND WIFE, 3; PLEADING, 11; PROMISSORY NOTE, 5.

1. *Fraud Without Damage.*—Fraud without damage constitutes no ground of defence.
Branham et al. v. Record, 181
2. *Bond of Indemnity.—Mortgage.—False Representation.*—Where a per-

son who, as surety, had executed an indemnifying bond, and, to secure himself against liability, had taken from his principal a mortgage upon certain land, induced a purchaser of the land so mortgaged to agree in writing to assume all the obligations under the bond, and also induced him to pay over to him, said surety, the balance of the purchase-money of the land, after the discharge by said purchaser of certain debts, which said principal and surety had represented to such purchaser as the only obligations secured by the indemnifying bond;

Held, that said surety could not require said purchaser to repay to him other moneys afterward collected from said surety, under such bond, for liabilities not disclosed to the purchaser. *Ricketts v. Braun et al.*, 316

3. *Conveyance to Defraud Creditors.*—Where slanderous words were spoken on the 1st day of August, and the persons liable to an action therefor, to avoid such liability for damages, fraudulently conveyed their real estate to their children without valuable consideration, on the 17th day of November, following, the grantees having notice of such fraudulent intent, and such action was commenced on the 26th day of the same month, and a recovery was subsequently had;

Held, that these facts were sufficient to subject the property to the judgment obtained. It was unimportant whether the deed was delivered before or after the commencement of the action. *Shean et al. v. Shay et al.*, 375

4. *Same.—Creditor.*—One having a cause of action for slander is a creditor within the intent of the statute against fraudulent conveyances. *Id.*

5. *Contract to Defraud Creditors.—As Between the Parties.*—A contract made to hinder or delay creditors is illegal as to creditors only. As between the parties, and as to all others than creditors, it is legal and valid, and can be enforced in all its terms as any other contract. *O'Neil v. Chandler*, 471

6. *Pleading.*—Fraud in obtaining the execution of a contract cannot be pleaded without alleging the facts constituting the fraud.

Joest v. Williams, Adm'r, 565

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

GARNISHMENT.

See ATTACHMENT, 4 to 10.

GRAND JURY.

See CRIMINAL CIRCUIT COURT, 1, 2; CRIMINAL LAW, 17.

Impanelling.—Under the act of March 10th, 1873, p. 158, regulating the convening of grand juries, where the record of a criminal action showed that the court met on the 24th of March, 1873, and the grand jury was impanelled on the 2d day of the term, it was presumed that they had been summoned pursuant to an order of the judge or prior to the approval of the act. The act did not prohibit the impanelling of a grand jury previously summoned.

Bell v. The State, 335

HIGHWAY.

See ESTOPPEL, 1.

1. *Claim for Damages.—Waiver.*—Where, upon a petition being filed for the location and opening of a proposed highway, a remonstrant over whose lands it would pass appeared in the commissioners' court, and made no objection to the sufficiency of the petition, the giving of notice, or as to the utility of the proposed highway, but filed his claim for damages;

Held, that he waived all questions of irregularity in the proceedings and as to the utility of the road. *Fisher v. Hobbs et al.*, 276

2. *Evidence of Use by Public.—Instruction.*—In determining whether a pro-

posed road will be of benefit or injury to a particular farm, it is proper for the jury to consider the existence or non-existence of the roads that pass over or near the farm; and the legality and permanency of such roads are of vital importance. Accordingly, it was error for the court to refuse to instruct the jury, that by the unopposed use of any road over the lands of the remonstrant by the public, he being cognizant thereof, until public accommodation and private rights would be materially affected by the interruption of the same, although the use had not continued twenty years, he would be barred of his right to close the highway. *Ib.*

HUSBAND AND WIFE.

See CONTRACT, 7; DESCENT, 1, 2.

1. *Vendor's Lien*.—Where a wife, her husband, and a third person were joint purchasers of certain real estate, and the deed of conveyance was made to them, and notes given for the purchase-money were not signed by the wife, but were signed by the husband and the other purchaser, and the husband and wife were purchasers of one-half of the premises, and the next day after the deed was made, the purchasers, with the consent of the vendor, had the name of the husband struck out of the deed by the justice of the peace who took the acknowledgment, and afterward the wife signed the notes;

Held, that the vendor would be entitled to hold a lien upon the real estate for the unpaid purchase-money, as against the wife.

Held, also, that the notes, as to the wife, were absolutely void, and she was not bound by stipulations therein to pay ten per cent. interest and to waive valuation and appraisement laws. *Anderson v. Tannehill*, 141

2. *Tenants by Entireties*.—Where real estate is conveyed to a husband and wife and another person jointly, the husband and wife will take an undivided one-half of the premises, as tenants by entireties. *Ib.*

3. *Evidence*.—*Fraudulent Conveyance*.—Certain real estate was purchased of A. and conveyed to B., and by B. and his wife conveyed to C., the father of B.'s wife, and by C. conveyed to the wife of B. In a proceeding to subject said real estate to the payment of a judgment against B. on the ground of fraud;

Held, that under an answer of general denial evidence was admissible that C. was to pay A. the consideration for the real estate; that the deed was to have been made in the name of B.'s wife; that it was made to her husband without her knowledge and consent, and that she objected to its being made to her husband as soon as she knew of the fact.

Summers et al. v. Hoover et al., 153

4. *Conveyance to Wife*.—*Gift from Father*.—Where a father, to provide his daughter with a home, paid the purchase-money for certain real estate, intending to make a gift of it to his daughter, and the real estate was conveyed to the husband of the daughter, and she never relinquished to her husband her right to hold the purchase-money or the benefit of it to her separate use; and afterward the husband, in consideration that his wife's father had paid the purchase-money for her benefit conveyed the real estate through the father to her, she had the right to hold it against a creditor of the husband. *Ib.*

5. *Same*.—Where a married man, about the time of making a purchase of real estate, informed his wife that if her father would pay the purchase-money he would have the conveyance made to her; and the father of the wife, in pursuance thereof, paid for the land; and without the consent of the wife, or of her father, the deed was taken in the name of the husband; and afterward, being in failing circumstances, he, in order to fulfil his promise to his wife, conveyed the real estate to her through a trustee;

Held, that the conveyance was founded on a good consideration, and was not fraudulent, and the land could not be taken from the wife to pay the debts of the husband. *Ib.*

IGNORANCE.

See CONTRACT, 5.

INFORMATION.

Jurisdiction.—Court of Common Pleas.—The court of common pleas had jurisdiction to hear and determine an action in the nature of a *quo warranto*, and the information in such case might be filed by the district attorney. *The State, ex rel. Ford, v. The Kankakee Valley Dr'g Co.*, 353

INJUNCTION.

See APPEAL; PLEADING, 5; TURNPIKE, 2, 3.

INSTRUCTIONS TO JURY.

See CRIMINAL LAW, 29, 30, 33, 34; NEW TRIAL, I, IO, II.

1. *Evidence.*—A court may refer to the evidence in a cause and present it to the jury in the summing up and charge, but the court should not show to the jury any leaning in favor of one of the parties.

McCorkle et al. v. Simpson, 453

2. *Harmless error.*—If instructions given to a jury, taken as a whole, present the law correctly, the judgment will not be reversed, though a single instruction, standing alone, might seem to be incorrect.

Eggleston v. Castle, 531

3. *Same.*—Where instructions given embrace all there is of substance in instructions refused, there is no error in such refusal. *Id.*

4. *Same.*—An instruction inapplicable to any evidence given should be refused. *Id.*

5. *Evidence.—Instruction to Find Against Plaintiff.*—Where a demurrer to the evidence would be sustained, the court may instruct the jury to find against the plaintiff. Accordingly, where the plaintiff has introduced his evidence and rested, and the evidence introduced does not tend to prove the plaintiff's cause of action, the court may refuse to hear evidence offered by the defendant, and direct the jury to find against the plaintiff.

Steinmetz v. Wingate, 574.

INSURANCE.

1. *Mutual Insurance Company.—Receiver.—Assessment.—Pleading.*—*Embree v. Shideler*, 36 Ind. 423, adhered to. *Hashagan v. Manlove*, 330

2. *Fire Insurance.—Principal and Agent.—Ratification.*—A. and B. were equal partners in the business of insurance agency at the town of N., the former alone being the agent of some companies, the latter alone of others, and both jointly of others, they having a common office and acting together in soliciting business, the profits from all the agencies being divided between the partners. During a temporary absence of A., a policy of re-insurance in a certain company of which he alone had been appointed agent at N., and concerning which he alone had complied with the statute relating to foreign insurance companies, was, upon application, issued, countersigned by B., in the firm name, as agents. It had been understood between A. and B. and the agent who had appointed A., that B. was to participate in the business and instruct A. in its duties. The policy contained a provision that it should not be valid unless countersigned by the company's duly authorized agent at N. The policy had been previously signed by the president and secretary of the company. The premium was paid to B. and was accounted for by A., in his next monthly report to the company, A. having returned to N., and having been informed of the issuing of the policy and of its having been so countersigned in the firm name. Before making said report, A. was wrongly informed that the insured property was being removed

to another state. The general agent of the company, upon being informed of the issuing of the policy and receiving a copy thereof, made some objections to A. as to the character of the risk, and A. informed said general agent that the property was being removed from the State, and that the policy would be cancelled. The re-insured company was in no way connected with or responsible for the statement that the property was being removed, and had no information concerning the objections raised by the general agent. About one month after the issuing of the policy of re-insurance and the payment of the premium, the property was destroyed by fire, the premium not having been returned or tendered to the re-insured company, which had no notice of dissatisfaction of the company that issued the policy or of its desire to cancel it.

Held, that neither A. nor the general agent having taken any steps to undo the acts of B., by returning the premium, or seeking to have the policy cancelled, or giving notice of dissatisfaction to the re-insured, but having allowed the re-insured to rest under the belief that the risk was complete and satisfactory; there was a ratification by the general agent, and hence by the insurance company, of the issuing of the policy.

The United Life, etc., Co. v. The Pres., etc., Co. of North America, 588

INTEREST.

It is not a violation of the law relating to interest to compute the interest on an existing note and include it in a new note given for the debt.

Hughes v. Osborn, 450

INTERROGATORIES TO PARTY.

See SUPREME COURT, 12, 23.

INTOXICATION.

Contract.—The intoxication of a person at the time of his execution of a contract does not render the contract void, but only voidable; and to defend against a contract on that ground, it must have been rescinded by restoring whatever was received as the consideration thereof.

Joest v. Williams, Adm'r, 565

JEOPARDY.

See CRIMINAL LAW, 39.

JUDGE.

See PRACTICE, 2, 3; SPECIAL FINDING.

1. *Bill of Exceptions*.—A person who has been a judge, and presided at the trial of a cause, possesses no power to sign a bill of exceptions in such cause after he has ceased to be a judge. *Ketcham, Adm'r, v. Hill*, 64

2. *Same*.—The successor in office of such judge has full power to sign a bill of exceptions embodying the evidence, and this court is bound to presume that in exercising such power he acted upon reliable information. *Id.*

JUDICIAL NOTICE.

See CRIMINAL LAW, 36.

JUDICIAL SALE.

See MORTGAGE, 4.

JUDGMENT AND DECREE.

See CITY, 9; CRIMINAL LAW, 24, 25; EVIDENCE, 5; MORTGAGE, 4; SUPREME COURT, 1, 3.

1. *Void Judgment*.—An illegal and void judgment will not bar another suit upon the same cause of action. *Packard et al. v. Mendenhall*, 598

2. *Same.—Jurisdiction of Person.*—If a defendant, against whom a judgment is rendered, received no notice, either actual or constructive, of the pendency of the action, the judgment is a nullity. *Id.*

JURISDICTION.

See DECEDENTS' ESTATES, 2; ELECTION, 3; INFORMATION; JUDGMENT, 2; WILL, 4, 5, 9.

1. *Common Pleas Court.—Specific Performance.*—Where, in an action in the court of common pleas for specific performance of a contract for the sale and conveyance of real estate, the court overruled a demurrer to the complaint for want of jurisdiction;

Held, that as it did not appear that the title to the property would be involved, and as the proper course, if such had been the case, would perhaps have been a motion to transfer the cause to the circuit court, there was no error.

Snideman v. Rinker, 223

2. *Same.—Trial and Judgment.*—An answer of general denial was filed, not sworn to, and the court tried the case and rendered judgment for specific performance.

Held, that it could not be said that the court erred in entertaining jurisdiction. *Id.*

JUROR.

See NEW TRIAL, 6.

JURY.

See CRIMINAL LAW, 39; DRAINING ASSOCIATION, 4.

1. *Impanelling of Special Jury.—Statute.*—The act of March 7th, 1873 (Acts 1873, Reg. Ses. p. 103), empowering the circuit court, whenever its business requires it, to order the impanelling of a special jury for the trial of any cause, does not authorize the court to impanel such jury before the day fixed for the trial of causes, to which day the regular panel has been summoned. It was intended to authorize a special jury when the regular panel is engaged or after it has been discharged. *Wilson v. The State*, 224

2. *Same.—Jury Trial.*—Where a person indicted for grand larceny expressed himself as ready for trial on the fifth day of the term, none of the petit jury being present, not having been summoned to attend until the seventh day, and the court ordered a special jury to be impanelled, over the objection of the defendant, and proceeded to try him;

Held, that the trial was irregular, and the defendant was entitled to a new trial. *Id.*

JUSTICE OF THE PEACE.

See COSTS, 1; CRIMINAL LAW, 3, 4.

1. *Appeal.—Application for.*—On an application made under sec. 68, p. 597, 2 G. & H., for an order to authorize an appeal from a judgment of a justice of the peace, it may be said that a party has been prevented from taking an appeal by circumstances not under his control, when it clearly appears that he did not know within the time allowed for taking the appeal that the suit had been brought or judgment rendered. *Brooks v. Harris*, 177

2. *Same.—Set-Off Pending Appeal to Supreme Court.*—Where a judgment has been rendered before a justice of the peace, and the defendant has applied for an order to allow an appeal, which order has been refused, from which refusal an appeal has been taken to the Supreme Court; while the appeal is pending, an order made in the court below, setting off the judgment from which an appeal is sought against a like amount due on a judgment in favor of the defendant in the former judgment and against the plaintiff in said former judgment, will have no effect on the appeal. *Id.*

LANDLORD AND TENANT.

Lease.—Privilege of Renewing.—Election.—Holding Over.—Relief in Equity.

Where real estate was leased for a term of five years, the rent to be paid semi-annually, and the lease contained a clause providing that the lessee was "to have the privilege of renting said premises for another term of five years," at the same rent and payable in the same manner, and after the five years expired the lessee continued in possession for eighteen months, paying rent as before, but no demand was made by the lessee for a renewal of the lease, and three months before the expiration of the second year after the expiration of the five years, possession was demanded by the lessor and notice to quit at the end of the current year served upon the lessee;

Held, that continuing to hold possession after the expiration of five years and paying rent by the lessee according to the terms of the lease, and the acceptance of the rent by the lessor, did not amount to the creation of a new term for five years.

Held, also, that under the covenant or agreement to renew the lease, the lessee must have elected to renew the lease and must have given notice thereof at or before the expiration of the first term; and it was too late to do so after the expiration of eighteen months and after notice to quit.

Held, also, that a failure to give such notice at the proper time was not a failure which could be relieved against in a court of equity, except when the failure had resulted from unavoidable accident, fraud, surprise, or ignorance not wilful, and upon compensation being made.

Thiebaud et al. v. The First Nat'l Bank of Vevay, 212

LARCENY.

See CRIMINAL LAW, 36, 38.

LIMITATIONS, STATUTE OF.

See STATUTE OF LIMITATIONS.

LIQUOR LAW.

See CONSTITUTIONAL LAW, 1 to 5.

1. *Indictment.—Sunday.—Permit.*—In an indictment for the sale of intoxicating liquor on Sunday to be drank on the premises, it is not necessary that there should be an express allegation that the defendant had no permit to sell liquor, as such permit would not authorize a sale on that day.

Lehritter v. The State, 383

2. *Same.—Evidence.*—When, on the trial of such an indictment, the proof showed that the selling was on the 4th day of May, and on Sunday, but there was no proof as to the year;

Held, that the conviction could not be sustained, although May 4th, 1873, was Sunday. *Ib.*

3. *Act of 1859.—Sale for Medical Purposes.*—On the trial of an indictment for selling intoxicating liquor without a license under the act of 1859, the proof was, that the defendant, a druggist, sold a pint of liquor on the statement of the purchaser that it was for medical purposes, and it was so used.

Held, that the defendant should have been acquitted. *Jakes v. The State*, 473

4. *Temperance Law of 1859, 1873.—License.—Penalties.*—Section 21 of the Temperance law of 1873 intends that persons who held a license under the law of 1859 should have a right to sell until such license expired, as if they had had a permit under the new law for such time, and that they should be subject to the penalties of the new law for any violation of its provisions.

Lehritter v. The State, 482

5. *Same.—Sale on Sunday.—License.—Evidence.*—On the trial of an indictment for selling liquor on Sunday, the proof of a license under the act of 1859 was immaterial, as such license did not authorize a sale on Sunday. *Ib.*

MANDATE.

See RAILROAD, 6.

MAYOR.

See DEPOSITION, 3.

MISTAKE.

See PLEADING, 12.

MORTGAGE.

See VENDOR AND PURCHASER, 1, 2, 3.

1. *Foreclosure.—Agreement to Release.—Reformation of Instrument.*—To a suit to foreclose a mortgage upon different pieces of real property, one of the defendants answered that he had purchased one piece of the property mortgaged from his co-defendant, the mortgagor; and in consideration of the payment of a certain sum to the plaintiffs by this defendant, the plaintiffs were to release the land from the mortgage; and the plaintiff G., for himself, signed the deed conveying the property, but by mistake failed to sign also, as had been agreed, for his sisters, his co-plaintiffs, whose agent he was. A reformation of the deed was asked.
Held, on demurrer that the facts entitled the defendant to a reformation of the deed, but that such reformation was not necessary to defeat the suit as to the land conveyed. *Knarr v. Conaway et al.*, 260
2. *Pleading.—Paragraph.*—Each paragraph of an answer must be complete in itself, and a failure to describe the piece of land sought to be released from the lien of a mortgage would be a fatal defect in such paragraph. *Ib.*
3. *Waste.—Duty of Mortgagee and Purchaser.*—It is not the duty of either a mortgagee or the purchaser of the equity of redemption of a part of the property mortgaged, although it is his right, to enjoin the committing of waste; and the failure so to do furnishes no ground for requiring an account from the mortgagee, at the instance of such purchaser, and a credit upon the mortgage debt of the amount of waste committed upon other pieces of property included in the mortgage. *Ib.*
4. *Decree.—Form of.—Judicial Sale.*—A decree giving the plaintiff the right to direct the sale of different pieces of property, on foreclosure, is erroneous. The court should direct the order of sale in the decree. *Ib.*
5. *Description of Land.*—A mortgage was executed to the State on "all the west half of the north-west quarter of section 8, township 6, range 7," without stating in what county or state the land is situated or at what particular land-office it was subject to entry.
Held, that the mortgage, for the want of more certainty as to the land intended to be mortgaged, vested no interest in the State in any particular land; therefore, a sale by the auditor under the mortgage was a nullity and vested no title in the purchaser. *Cochran v. Utz*, 267

MURDER.

See CRIMINAL LAW, 18 to 34.

NEGLIGENCE.

See CITY, 14; RAILROAD, 1, 2, 4, 5.

NEW TRIAL.

See ATTACHMENT, 3; CRIMINAL LAW, 11, 31; PRACTICE, 1, 6, 11; SUPREME COURT, 2, 6, 10.

1. *Motion*.—A motion for a new trial on the ground of error of law occurring at the trial must point out the error relied upon to sustain the motion. So of error in giving instructions, the instructions objected to must be pointed out. So of irregularity in the proceedings of the jury, the irregularity complained of must be pointed out. *Marley v. Noblett*, 85
2. That the court erroneously sustained a motion to strike out certain pleadings, is not a cause for a new trial. *Shafer v. Bronenberg et al.*, 89
3. *Pleading*.—*Complaint for New Trial*.—In a complaint to obtain a new trial on the ground of newly-discovered evidence, it is not necessary to make a transcript of the record of the former trial a part of the complaint; but it is necessary to state the issues and evidence on the trial, and also the newly-discovered evidence. *Rickart et al. v. Davis et al.*, 164
4. *Newly-Discovered Evidence*.—*Diligence*.—To entitle a party to a new trial on the ground of newly-discovered evidence, he must show that he used due diligence to obtain it; and it is not sufficient to say, that up to the time of the former trial, and for some days after, he was not able by proper diligence to discover it. *Ib.*
5. *Same*.—The discovery of new evidence which is merely cumulative is not a good cause for a new trial. *Zouker v. Wiest*, 169
6. *Juror not a Householder*.—Where a motion for a new trial has been made on the ground that one of the jurors was not a householder, and that the party making the motion accepted him in ignorance of that fact, and the court has overruled the motion, the ruling will be sustained on appeal, if in the affidavits on the point the preponderance of testimony sustains the ruling. *Pickens v. Hobbs et al.*, 270
7. *Motion*.—That the court erred in permitting improper, illegal, and irrelevant testimony to be given on the trial, is not a sufficient statement of a ground for a new trial. *Ricketts v. Braun et al.*, 316
8. *Continuance*.—*Motion for New Trial*.—*Assignment of Error*.—The refusal to grant a continuance can only be presented as error by making it a cause for a new trial and assigning the overruling of that motion as error on appeal. *Carr v. Eaton*, 385
9. *Motion*.—Error in sustaining a demurrer, and error in permitting a plaintiff to amend his complaint, are not causes for a new trial. *Dawson et al. v. Vaughan*, 395
10. *Instructions to Jury*.—The statement as a cause in a motion for a new trial in a criminal action, that the court misdirected the jury in a material matter of law (the attention of the court not being directed to the objectionable instruction, and no exception being taken to the instructions, the charge to the jury consisting of several distinct propositions), is too vague and uncertain to raise any question. *Stone v. The State*, 418
11. *Motion*.—*Instruction to Jury*.—A motion for a new trial, because of erroneous instruction to the jury, must point out in what particular the court has misdirected the jury. *Holding, Adm'r, v. Smith*, 536
12. *Same*.—*Evidence*.—A motion for a new trial on account of the admission of improper evidence must indicate what evidence has been improperly admitted. *Ib.*

NOTICE.

See TRUST AND TRUSTEE, 2, 3.

NUISANCE.

See CRIMINAL LAW, 2, 8.

OFFICER.

See CITY, 6,

Liability for Official Acts.—If a party contracts as a public officer, and in that capacity acts honestly, he will not ordinarily be personally liable. If his authority to act is defined by public statute, all who contract with him will be presumed to know the extent of his authority, and cannot allege their ignorance as a ground for charging him with acting in excess of such authority, unless he knowingly mislead the other party.

Newman et al. v. Sylvester, 106

PARENT AND CHILD.

Liability for Board. See CONTRACT, 7.

PARTIES.

See CITY, 7, 8, 9, 15; DECEDENTS' ESTATES, 3, 4, 5; PROMISSORY NOTE, 1; WILL, 10.

Defect of.—A demurrer to a complaint on the ground of a defect of parties defendants should be overruled, where it is not shown who ought to be added as defendants.

Willett et al. v. Porter et al., 250

PAYMENT.

Voluntary Excessive Payment. See DELINQUENT LIST.

By Third Person.—*Acceptance by Creditor.*—Payment or satisfaction of a debt may be made by a third person to the creditor, and if accepted by him it will operate as such.

Ritenour v. Mathews, 7

PLEADING.

See BANKRUPTCY; BILL OF EXCHANGE, 2; CITY, 14; CRIMINAL LAW, 18, 21 to 28; DRAINING ASSOCIATION, 1; FRAUD, 6; MORTGAGE, 2; NEW TRIAL, 3; PRACTICE, 5; PROMISSORY NOTE, 1, 3, 8; SCHOOLS, 6.

1. *Failure to Reply.*—An affirmative answer, where the case has been tried without a reply, will be deemed to have been controverted on the trial, in the same manner as if a reply in denial had been filed.

McAlister v. Howell, 15

2. *Answer to Part of Cause of Action.*—An answer which assumes to be in bar of the whole action, when it is only in bar of a part, is bad.

Gulick v. Connely, 134

3. *Sheriff's Bond.*—*Demurrer.*—In a suit upon a sheriff's bond, a failure to set out the bond with the complaint renders the complaint bad on demurrer.

Prince et al. v. The State, ex rel. Sage et al., 315

4. *Abatement.*—*Another Action Pending.*—An answer in abatement, alleging the pendency of another action, must show that it is between the same parties.

Dawson et al. v. Vaughan, 395

5. *Injunction.*—*Levy of Execution.*—Complaint by A., alleging that B. recovered a judgment against A. and a turnpike company; that execution was issued on the judgment; that the sheriff had levied the execution on the house and lot of A., being his homestead and dwelling-house; and that at and before the time of the levy, A. and the turnpike company offered to give up a toll-house to be levied upon and sold to satisfy the execution. Prayer, that the sheriff be enjoined from selling the house and lot of A.

Held, that the complaint was bad, for not averring that the toll-house belonged to the execution defendants, or one of them.

Alexander v. Mullen et al., 398

6. *Counter-Claim.*—*Written Instrument.*—Where a written contract is set out in a complaint and is the foundation of the action, the defendant, in setting up a counter-claim against the plaintiff upon the same contract, and seeking a judgment thereon in his own favor, must set out in his own pleading the original or a copy of the contract.

Campbell et al. v. Routt, Adm'r, 410

7. *Answer in Bar.*—*Counter-Claim.*—No single pleading can be made to per-

form the double function of alleging matter in bar of an action brought by one party, and at the same time set up a cause of action in favor of the adverse party. *Ib.*

8. *Counter-Claim*.—If a pleading alleges facts arising out of, or connected with, the plaintiff's cause of action, as the foundation of a claim in favor of the defendant against the plaintiff, and claims a judgment against the plaintiff for damages, or claims other affirmative relief, the pleading must be regarded as a counter-claim, and nothing else. *Ib.*
9. *Same.—Failure to Demur*.—A counter-claim is a complaint, within the spirit and intent of the statute providing, that the objection that a complaint does not state facts sufficient to constitute a cause of action is not waived by a failure to demur thereto. *Ib.*
10. *Same*.—A counter-claim, like any other pleading, should be good by itself without aid from other pleadings in the cause or exhibits contained therein. where such exhibits are in no manner adopted and made a part of such counter-claim. *Ib.*
11. *Contract.—Fraud*.—Complaint to reform a contract and enforce it, alleging that the defendant undertook to reduce a contract between the plaintiff and the defendant to writing; that he fraudulently wrote it differently from the contract really made; that he read it as really made; and that it was signed by the plaintiff, believing its terms to be as it had been agreed they should be. *Held*, on demurrer, that this was sufficient. *New et al. v. Wambach et al.*, 456
12. *Same.—Mistake*.—A paragraph of complaint for the same purpose, alleging that the defendant wrote the contract, and, by mistake, it was written differently from what it was agreed it should be, was held good on demurrer. *Ib.*
13. *Departure.—Joint Contractors*.—In a suit upon a joint contract, if an answer shows that the plaintiff has discharged one of the joint contractors, and the plaintiff replies that it was agreed by the defendants at the time of the discharge, that it should not operate as a release of the other defendant, though such reply may be a departure, it is waived if no objection be taken on that account, and the parties proceed to trial upon the issues thus joined; and the defendant who was not released cannot, after trial and verdict, object that no verdict has been rendered as to the defendant admitted by the reply to have been released. *Ib.*
14. *Same*.—In case of a departure, if, instead of demurring, the defendant takes issue upon the reply, and the issue be found against him, the court will not arrest the judgment because of the departure. *Ib.*
15. *Defence*.—A defendant cannot set up a defence that did not exist at the commencement of the action. *Musselman v. Manly*, 462
16. *Supplemental Complaint*.—A supplemental complaint is not a substitute for the original complaint; it is a further complaint and assumes that the original complaint is to stand. It must consist of facts which have arisen since the filing of the original complaint. *Ib.*
17. *Same.—Practice*.—A supplemental complaint may be filed after answer, but whether filed before or after, it must be by motion and leave of court; and it must appear on its face that it is supplemental and relates to matters which have accrued subsequent to the commencement of the action. *Ib.*
18. *Amendment of Complaint*.—Matters which occurred prior to the filing of a complaint must be brought into the suit by amendment. *Ib.*

PRACTICE.

See APPEAL; ATTACHMENT; BILL OF EXCEPTIONS; CONTINUANCE; CRIMINAL LAW, 6, 9, 11; DEPOSITION, 1, 2; DRAINING ASSOCIATION, 2, 3, 4; EVIDENCE, 1, 2; GRAND JURY; INSTRUCTIONS TO JURY; JUDGE, 1, 2; JUSTICE OF THE PEACE, 1, 2; PLEADING, 17; PROCESS; SPECIAL FINDING; SUPREME COURT.

1. *Motion for Judgment on Special Finding.—Motion for New Trial*.—A motion

for judgment on special findings, notwithstanding the general verdict, may be made, without losing the right to afterward move for a new trial.

Brannon et al. v. May, 92

2. *Cause Dropped from Docket by Mistake.*—*Notice.*—Where, in a case pending in the circuit court, on account of the judge having been of counsel therein a judge of the common pleas court was called in, and a time was fixed for the trial, but the judge called failed to attend;

Held, that the case should have been continued on the general docket of the circuit court by the clerk; and he having, by mistake, dropped it from that docket, and entered it upon the common pleas docket, from which it was struck on motion, he should have re-entered it upon the circuit court docket, and on failure to do so should have been so ordered by the court, on motion of a party, without any notice being required to be given the other party.

Arnold v. Norton et al., 248

3. *Return of Verdict.*—*Clerk.*—The clerk of a court cannot, by agreement of the parties to an action, in the absence of the judge, preside at the return of the verdict and during the polling of the jury, receive the verdict, and discharge the jury.

Willitt et al. v. Porter et al., 250

4. *Striking Out.*—*Evidence.*—Immaterial matter in a complaint may be struck out on motion, or evidence offered in support of it may be rejected. *Id.*

5. *Appeal.*—*Judgment by Agreement.*—*Supplemental Pleading.*—Where, upon appeal, it was agreed, that if the instructions of the court below had been erroneous as applied to the evidence, the Supreme Court should render a proper judgment without a new trial, and this court thereupon fixed the basis of a judgment and directed the court below to render such a judgment, a party to the agreement could not, when the case was remanded, file a supplemental answer alleging partial payment upon execution issued pending the appeal; all the lower court could do was to enter the judgment as directed.

Burnett et al. v. Curry, 272

6. *Cause Reversed on Appeal.*—*Time of New Trial.*—*Statute Continued in Force.*—This provision in the statutes of 1843 is continued in force by sec. 802, p. 336, 2 G. & H.: "Whenever any cause is reversed in the Supreme Court, in whole or in part, on appeal or writ of error, and sent back for such further proceedings as may require a trial by jury, if the decision and opinion of the Supreme Court in such cause shall have been deposited in the office of the clerk of the inferior court sixty days or more before the first day of any term of such court, such cause shall stand for trial at such term; otherwise it shall be continued until the next term of the court."

Stockton et al. v. Coleman et al., 281

7. *Breach of Covenant of Seisin.*—*Action not Local.*—A., the grantee in a deed of conveyance of certain real estate from B., brought suit against C., who had conveyed the land to B., for breach of a covenant of seisin in his deed to B.

Held, that the action was not local; that the suit was one to be brought, not in the county where the land was situated, but in the county where C. resided.

Coleman v. Lyman, 289

8. *Demurrer to Evidence.*—*Statement of Evidence.*—*Joinder in Demurrer.*—The party demurring to evidence should set out in full the evidence and demur thereto; and if the other party join in the demurrer, he admits that the evidence is properly set out. If the party offering the evidence denies the correctness of the statement thereof, he should refuse to join in the demurrer, and point out to the court the matters of omission or addition, and the court should require the demurring party to state the evidence correctly.

Lindley v. Kelley, 294

9. *Same.*—*Assessment of Damages.*—Where there is a demurrer to evidence and a joinder therein, the court may have the damages assessed by the jury conditionally, or the jury may be discharged and a new jury called if the demurrer be overruled. The latter is the usual and the better practice. *Id.*

10. *Same.—Judgment.—Exception.—Assignment of Error.—Pleadings.—Conclusions from Evidence.*—If the demurrer be sustained, the judgment is like a final judgment on a successful demurrer to the complaint or answer. An exception to the ruling and an assignment of error thereon reserve the question; but defects in the pleadings cannot be taken advantage of to support the ruling, and the court will infer from the facts any conclusions the jury could reasonably have inferred. *Ib.*
11. *Same.—Motion for New Trial.—In Arrest.*—If the demurrer be overruled and damages be assessed, a motion for a new trial may be made for error in such assessment, or in arrest of judgment for any defect in the pleadings sufficient in our practice to arrest judgment in other cases. *Ib.*
12. *Same.—Bill of Exceptions.*—Where there is a demurrer to evidence, there is no bill of exceptions. Where a bill of exceptions is tendered, the evidence must go to the jury. *Ib.*
13. *Motion to Dismiss.—Special Cause.*—A refusal to grant a motion to dismiss a case, on a special ground assigned, which is insufficient, is not erroneous, although other grounds might have justified such dismissal.
Curry v. Miller, 320
14. *Striking out Paragraph.*—It is not error for the court, on motion, to strike out a paragraph of a pleading, when the evidence admissible under it may be introduced under a remaining paragraph.
Spencer v. Woollen et al., 364
15. *Inspection of Papers.—Motion.*—A motion to require the opposite party to produce a paper for inspection should show its contents, that the court may determine its relevancy. *Ib.*
16. *Venue.—Change of.—Issues.*—When a motion is made to change the venue of a cause from the county, on account of local prejudice, the court may suspend action on the motion until the issues are closed; for it may happen that there will be nothing for a jury to try. *Dawson et al. v. Vaughan, 395*
17. *Motion to Strike Out.*—Where a complaint contained three paragraphs, each based on the same written instrument, and the court overruled a motion to strike out one of the paragraphs and a part of another because they made the complaint cumbersome and voluminous;
Held, that the ruling was not an error for which the judgment would be reversed.
Shanefelter et al. v. Kenworthy, 501
18. *Motion to Reject Pleading.*—In an action on an account, commenced before a justice of the peace, there was an answer in two paragraphs, of which one was a general denial. A motion to reject the whole answer for insufficiency thereof, filed by the plaintiff, in such a form as to be inseverable, was overruled.
Held, that this ruling was not erroneous. *Steinmetz v. Wingate, 574*
19. *Trial Without Issue.*—Where the parties to an action, without objection, go to trial without an issue formed upon the complaint, the defendant cannot, after verdict, complain of the want of an issue.
Stingley et al. v. The Second Nat'l Bank, 584

PRESUMPTION.

See CRIMINAL LAW, 14, 36; SUPREME COURT, 21.

PRINCIPAL AND AGENT.

See INSURANCE, 2; TRUST AND TRUSTEE, 3.

1. *Liability of Agent.*—One assuming to act as agent for another without authority does not necessarily render himself liable. It is when he knowingly or carelessly assumes to act without being authorized, or conceals the true state of his authority, and falsely leads the party with whom he contracts to repose in his authority, that he may be liable.
Newman et al. v. Sylvester, 106

2. *Same.*—If one enters into a contract in the name of another and as his agent, and does it honestly, fully disclosing all the facts touching the authority under which he acts, so that the one contracted with, from such information or otherwise, is fully informed of the authority possessed or claimed, the agent is not liable on the ground of deceit or for misleading the other party. *Id.*
3. *Same.*—It is material in such case that the party complaining of a want of authority in the agent should be ignorant of the truth touching the agency. If he has full knowledge of the facts, or of such facts as fairly and fully put him upon inquiry, and he fails to avail himself of such knowledge, or the means of knowledge reasonably accessible, he cannot, in the absence of fraud, say that he was misled, simply on the ground that the party assumed to act as agent without authority. *Id.*

PRINCIPAL AND SURETY.

Promise on Condition of Release.—A surety on a promissory note, fearing he would have to pay the debt, promised his principal, that if he would procure other security and release him from liability, he would surrender certain promissory notes, which he held against the principal. The principal thereupon did substitute other securities, and the surety on being so released from liability on the note refused to comply with his promise.

Held, that the promise was without consideration and could not be enforced.

Ritenour v. Mathews, 7

PROCESS.

See APPEARANCE, 2.

1. *Summons.—Service by Copy.—Seal.*—When service of summons is made by leaving a copy at the last or usual place of residence, it is not necessary that the seal should be copied. *Hughes v. Osborn*, 450
2. *Same.—Motion to Set Aside.*—A summons will not be set aside because it requires the defendant to appear "in the Court of Common Pleas of Monroe County," and the complaint is entitled, "Common Pleas Court, Monroe County." *Id.*

PROMISSORY NOTE.

See STATUTE OF LIMITATIONS, 1.

1. *Pleading.—Party in Interest.*—Where in a complaint on a promissory note it is alleged that the note was indorsed to the plaintiff, an answer alleging that the plaintiff is not the real party in interest amounts to nothing; nor does an allegation that the payee of the note sold and assigned it to the plaintiff and certain other persons, meet the allegation that it was indorsed to the plaintiff. *Shafer v. Bronenberg et al.*, 89
2. *Renewal.—Instructions.*—Where a promissory note sued on was given in renewal of six other notes executed by the defendant, it was error to charge the jury, that if they believed that after the execution of the note in suit the plaintiff retained the six notes originally made by the defendant, as subsisting liabilities, and failed or neglected to deliver them up, the finding must be for the defendant. *Perrin et al. v. Royal et al.*, 132
3. *Pleading.—Evidence.—Agreement to pay Attorney's Fees.*—Where a promissory note contains an agreement to pay attorney's fees, such agreement should be alleged in the same paragraph of complaint that asks a recovery on the note; and evidence is admissible in support of such averment. *Mathews v. Norman et al., Adams*, 176
4. *Agreement to Pay Attorney's Fees.*—An agreement in a promissory note to pay reasonable attorney's fees if the holder is required to resort to legal proceedings to collect the note, is valid. *Id.*

5. *Fraud in Obtaining Signature.—Want of Delivery.—Innocent Holder.—Estoppel.*—Where the maker of a promissory note payable at a bank in this State was induced by the fraud and circumvention of the payee to sign his name to such note, when he honestly supposed and believed that he was writing his name on a blank piece of paper, to enable the payee to see how his name was spelled or written, and the maker did not, after he discovered that he had so signed his name to the note, voluntarily deliver it to the payee, but it was taken possession of wrongfully and forcibly by the payee, and by him carried away against the consent of the maker and negotiated;

Held, that the maker was no more bound by his signature than if it were a total forgery, although the person to whom it was negotiated was a purchaser and holder in good faith and for a valuable consideration before maturity.

Held, also, that admitting that the maker signed his name to the note, with full knowledge of its character, it was nevertheless invalid and void, even in the hands of an innocent purchaser for value, for the want of delivery; nor was the maker liable on the ground that when one of two innocent persons must suffer by the act of a third, he who has enabled such third person to occasion the loss must sustain it. *Cline v. Guthrie*, 227

6. *Individual Signature.—Note of Corporation.*—A promissory note was executed in these words:

"\$ 1,000.

MT. VERNON, IND., May 2d, 1868.

"Two years after date, we, the undersigned, worshipful master and wardens of Mt. Vernon Lodge, No. 163, F. & A. M., and trustees of said lodge, for its use, promise to pay to the order," etc.

[SIGNED.]

"JOHN CONYNGTON, W. M.

"S. H. PEARSE, S. W.

"EDWARD BROWN, J. W.

"G. W. THOMAS, } Trustees."

"M. W. PEARSE, }

Held, that this was the note of the lodge, and the makers were not personally liable thereon. *Pearse et al. v. Welborn et al.*, 331

7. *Pleading.—Variance.*—Where suit was brought as upon a promissory note, and a due-bill was filed as an exhibit, it was held on demurrer, that the variance, being amendable under the statute, would be disregarded.

McDonald v. Yeager, 388

8. *Attorney's Fees.—Pleading.*—In a promissory note, a provision for the payment of attorney's fees, if suit be instituted on the note, is valid; and if it were invalid, a complaint on the note would not be rendered insufficient by a clause alleging the value of the attorney's fees.

Stingley et al. v. The Second Nat'l Bank, 580

PROSECUTING ATTORNEY.

See CRIMINAL LAW, 17.

QUO WARRANTO.

See INFORMATION.

RAILROAD.

See CITY, 10; CONTRACT, 4; CRIMINAL LAW, 13, 14.

1. *Injury to Animals.—Fence.—Negligence.*—Where, in an action against a railroad company for killing stock, it appeared that the railroad had been fenced, but a panel of the fence had been cut out and made into the form of a gate, but not hung on hinges, and the opening was used by persons hauling wood and placing it near the railroad track, and this was done with the consent of the railroad company, or without objection from it, a sub-tenant of the plaintiff being one of the persons hauling wood, and while he was

- so hauling, the gate was so set up that hogs of the plaintiff passed through the opening and upon the railroad, and were killed;
Held, that these facts did not show such negligence on the part of the plaintiff as to prevent his recovery. *The C., C., C., & I. R. R. Co. v. Swift*, 119
2. *Same.*—If a railroad company allow an opening to be made in the fence inclosing its road and left insecure, it cannot be said that the road is securely fenced; and if animals pass through the same and upon the railroad, and are killed, the company is liable without proof of negligence on the part of the company. *Id.*
 3. *Injury to Animal.—Fence.*—Where an animal is killed on a railroad at a point where the railroad crosses a public highway, where the road cannot be legally fenced, the owner of the animal cannot recover on account of the road not being fenced. *The J., M., & I. R. R. Co. v. Huber*, 173
 4. *Same.—Negligence.*—To entitle the owner of an animal killed on a railroad, at a point where the road could not be legally fenced, to recover therefor, he must show negligence on the part of the railroad company and the absence of negligence on his part. *Id.*
 5. *Same.*—Where the owner of an animal has been guilty of such negligence as to allow it to stray upon the track of a railroad at a point where it cannot be legally fenced, and it is killed, he cannot recover unless the animal was killed by the gross negligence or wilfulness of the railroad company. *Id.*
 6. *Tax Assessed to Pay for Stock in Incorporated Company.—Mandate.*—Neither a railroad company nor one to whom it has contracted to assign a subscription or donation, made by a county or township, under the act of 1869, can maintain an action for a mandate against the treasurer of the county, to compel him to collect a tax placed on his duplicate and assessed for the purpose of aiding in the construction of the railroad. All the acts of the voters and county commissioners in taking steps to raise money, with which to subscribe and pay for stock in an incorporated company, or make a donation to it, are between themselves, one the principal, and the other the agent; there is no contract in such case with the railroad company, nor has it any right or control over the matter, until the money is raised and the stock taken and paid for, or the donation actually made.
Sankey v. The T. H. & S. W. R. R. Co. et al., 402
 7. *Same.—Act of 1873.—Vested Rights.*—The act of January 30th, 1873, supplemental to the act of 1869, authorizing aid to railroad companies, is not unconstitutional on the ground that it divests rights vested in railroad companies, there being no rights to be divested. *Id.*
 8. *Injury to Animals.—Fencing.*—In an action, under the statute, against a railroad company to recover the value of a cow killed by a locomotive, it appeared in evidence that the animal was struck at a place on the railroad forty-three feet from the center of a public turnpike, which was legally sixty-six feet wide, said place not being fenced in, but being in an open space between a cattle-guard and the crossing of the railroad and turnpike.
Held, that the railroad company was liable under the statute, the railroad not being fenced according to law.
The I., C., & L. R. R. Co. v. Bonnell, 539

RECORD.

See BILL OF EXCEPTIONS; SUPREME COURT.

REMONSTRANCE.

See CITY, 10.

RES JUDICATA.

See JUDGMENT AND DECREE, I.

RESTRAINING ORDER.

See APPEAL.

RIOT.

See CRIMINAL LAW, 5.

RULE OF COURT.

See SUPREME COURT, 8, 14, 15, 16; THE GREEN RIVER, ETC., CO. v. MARSHALL, 470; THE STATE, *ex rel.* IRISH, v. KLAAS, 506; SUMNER v. DUNKIN, 530.

SABBATH.

See CRIMINAL LAW, 7; LIQUOR LAW, 1, 2, 5.

SCHOOLS.

1. *Statute Construed.*—The latter part of sec. 28 of the school law of 1865 (3 Ind. Stat. 449) has no application to incorporated towns and cities.
City of Crawfordsville v. Hays, 200
2. *Same.*—Section 164 of the same act, as far as it provides for appeals to the examiners from the action of the trustees in dismissing teachers, does not apply to incorporated towns and cities. *Ib.*
3. *Power of School Trustees in Incorporated Towns or Cities.—Dismissal of Teachers.*—There is no statute requiring or authorizing school trustees in incorporated towns or cities to dismiss teachers. *Ib.*
4. *Same.*—If a school-teacher employed to teach in the public school of an incorporated town or city, for a definite length of time, proves to be incompetent, and unable to teach the branches of study which he or she has been engaged to teach, either from a lack of learning or incapacity to impart learning to others, or if, in any other respect, there is a failure to discharge the obligations assumed by the contract, or implied from the nature of the employment, the school trustees of the town or city may dismiss the teacher from such employment. *Ib.*
5. *Same.*—If a teacher is employed for a definite length of time and has, in all respects, fulfilled the contract, such teacher cannot be discharged, without his or her consent, before the expiration of such time. *Ib.*
6. *Pleading.—Dismissal of School-Teacher.—Answer.*—In an action brought by a person employed to teach in the public school of an incorporated city, to recover for services rendered, the complaint alleging an employment for a definite length of time, an answer alleging that the teacher was dismissed by the school trustees, on charges made against such teacher, the trustees after notice to the teacher having adjudged the charges sustained, was bad. *Ib.*

SEAL.

See SUPREME COURT, 22.

SET-OFF.

See JUSTICE OF THE PEACE, 2.

SHERIFF.

See EXECUTION, 1 to 4.

SHERIFF'S SALE.

See MORTGAGE, 4.

SLANDER.

See FRAUD, 3, 4.

Actionable Words.—In a complaint for slander, the words spoken were alleged thus: "You are a G—d d—d, lying, thieving son of a bitch."
Held, on demurrer, that the words were actionable. *Reynolds v. Ross*, 387

SPECIAL FINDING.

1. *Judge.—Power to Correct Special Finding.*—A judge may correct his special finding during the term at which it is made, by finding upon issues that have been omitted. *Gulick v. Connely*, 134
2. *Same.—Must Make Finding.*—In making a special finding, where there is any evidence on a point pertinent to an issue in the cause, the court is required to find, either that the fact did exist or that it did not exist. *Ib.*
3. *Same.*—If the testimony is evenly balanced, the court should find against the party upon whom the burden of the issue rests. *Ib.*
4. *Motion for Venire de Novo.*—Where a court makes a special finding of facts and conclusions of law, but fails to find all the facts covering the issues and embraced therein, a motion for a *venire de novo* assigning such cause should be sustained. *Ib.*
5. *General Verdict.*—It is only when a special finding of facts is inconsistent with the general verdict, that the former will control the latter. *Ridgeway v. Dearing*, 157
6. *Same.*—If a special finding can by any hypothesis be reconciled with the general verdict, the latter will control, and the court will not render judgment against the party who has the general verdict in his favor. *Ib.*
7. *Made Without Request.*—Where a special finding of facts is made by the court, not having been demanded by either party, it will not be considered on appeal as being more than a general finding. *Hasselman et al. v. Allen et al.*, 257
8. *Exception to Conclusions.—Motion in Arrest.—Exception to Judgment.*—Where there is a special finding of facts, with conclusions of law thereon, there must be an exception to the conclusions of law, to reserve the question of the correctness of the conclusions. A motion in arrest of judgment, if available, is waived by not assigning the ruling thereon as error. Nor is an exception to the judgment available, as that must follow the finding and conclusions. *Curry v. Miller*, 320
9. *Signature of Judge.—Bill of Exceptions.*—When the court, at the request of a party, states the facts in writing, and then the conclusions of the law upon them, under section 341 of the code, and this special finding is not signed by the judge or incorporated in a bill of exceptions, the Supreme Court will not review the decision of the lower court upon the questions of law involved in the trial. *Welborn v. Lewis*, 363
10. *Regarded as General Verdict.*—When what purports to be a special finding of the judge is not signed by him, and was not requested by either party, and is not included in a bill of exceptions, it can only be regarded as a general finding. *Shean et al. v. Shay et al.*, 375

SPECIFIC PERFORMANCE.

See JURISDICTION, 1, 2; LANDLORD AND TENANT; VENDOR AND PURCHASER, 3.

STATUTE OF FRAUDS.

1. *Contract.—Time of Performance.*—Where no time is fixed for the performance of a contract, or where it is to be performed by a certain day (not

precluding the right to perform sooner), or where the performance depends upon a contingency which may or may not happen within the year, the contract is not within the statute of frauds. *Marley v. Noblett*, 85

2. *Parol Agreement for Conveyance of Real Estate.—Part Performance.—Written Agreement.—Merger.*—Where a son, having a claim against his father for labor and for an interest in certain crops, agreed to and did release the claim, move upon certain land belonging to his father, cultivate the same, and make visible, lasting, and valuable improvements, upon the verbal promise by his father to convey the land to him, and after nine years' residence and labor on the land, built a dwelling-house thereon, upon the receipt of a letter from his father, stating that if he would erect a building on the land, he should either be paid the value of the building and interest thereon, or a deed to the land should be made, at the option of the father;

Held, that the letter did not merge the parol promise previously made, the performance of which, by the plaintiff, took it out of the statute of frauds; and that the contract could be enforced after the death of the father, in an action against the other heirs to have the title of said son in the land declared.

Haddon et al. v. Haddon, 378

STATUTE OF LIMITATIONS.

1. *Promissory Note.*—Suit upon a promissory note payable generally without specified time or place, executed in May, 1858. Answer, that in 1860, the defendant removed to the District of Columbia and has ever since resided and now resides there; that a statute of that district limits actions upon promissory notes to three years from the maturity thereof. The action was brought in 1870.

Held, that the facts pleaded constituted a defence to the action in the place where the defendant resided, and under section 216, 2 G. & H. 161, the same defence was available here.

Wright v. Johnson et al., Ex'rs, 29

2. *New Promise.—Acknowledgment of Debt.—Evidence.*—No acknowledgment of a debt barred by the statute of limitations or promise to pay it is sufficient to take the case out of the operation of the statute, unless the same be contained in some writing signed by the party to be charged thereby. It is not competent to prove such acknowledgment or promise by parol.

Ketcham, Adm'x, v. Hill, 64

3. *Part Payment.—Parol Evidence.*—Part payment may be proved by parol. *Ib.*

4. *Same.*—An admission of continued indebtedness may be inferred from the fact of part payment; but the court is not allowed to imply such admission as an inference of law. It must be left to the jury. *Ib.*

5. *Same.*—Part payment is only *prima facie* evidence of an admission of continued indebtedness, and may be rebutted by other evidence and the circumstances under which it was made. *Ib.*

6. *Same.*—In order to take a case out of the statute of limitations by part payment, the payment must have been on account of the debt for which the action is brought. *Ib.*

7. *Same.*—The effect of part payment is the same under the code that it was at common law, but no indorsement or memorandum of any payment, made upon any instrument of writing, by or on behalf of the party to whom the payment purports to be made, will be deemed sufficient to take the case out of the operation of the statute. *Ib.*

SUMMONS.

See PROCESS, 1, 2.

SUNDAY.

See CRIMINAL LAW, 7; LIQUOR LAW, 1, 2, 5

SUPERIOR COURT.

Appeal.—Assignment of Error.—On appeal from the Superior Court to the Supreme Court, the error should be assigned upon the action of the court in general term. *Farman v. Ratcliff et al.*, 537

SUPREME COURT.

See ASSIGNMENT OF ERROR; BILL OF EXCEPTIONS; BRIEF; CONTINUANCE, 2; CRIMINAL LAW, 35; EVIDENCE, 4; PRACTICE, 5, 6; RULE OF COURT; SUPERIOR COURT.

Names of Parties in Assignment of Error. See THE GREEN RIVER, ETC., CO. v. MARSHALL, 470; THE STATE, *ex rel.* IRISH, v. KLAAS, 506.

1. *Objection to Judgment.*—Where a general objection is made to the rendition of a judgment, and no particular objections are pointed out to the court below, such objections cannot be made for the first time in the Supreme Court. *Sanxay v. Hunger*, 44
2. *Assignment of Error.—Motion for New Trial.*—Error in permitting a deposition to be read in evidence, and erroneous instructions given to the jury, are covered by an assignment of error in overruling a motion for a new trial, if such matters are properly embraced in the motion for a new trial. *Marley v. Noblett*, 85
3. *Objections to Judgment.*—Where no objection has been made in the court below to the form of a judgment, objections first made in the Supreme Court will not prevail. *The First Pres. Church v. City of Lafayette*, 115
4. *Assignment of Error.—Insufficient Complaint.*—Where the error assigned in the Supreme Court is, that a demurrer ought to have been sustained to the complaint, and no demurrer appears in the record, the sufficiency of the complaint is not presented by the assignment. *Ridgeway v. Dearing*, 177
5. *Petition for Rehearing.*—It is too late to present a question in the Supreme Court for the first time on a petition for a rehearing. *Brooks v. Harris*, 177
6. *Motion for New Trial.—Assignment of Error.*—If a motion for a new trial states the reasons on which it is based, a general assignment of error for overruling the motion brings them before the court for examination and judgment. If reasons which might be properly stated in such motion are omitted, assigning them as errors will not make them available in the Supreme Court. *Branham et al. v. Record*, 181
7. *Damages on Affirmance.—Stay of Execution.*—Damages cannot be given in the Supreme Court on affirmance, unless there has been a stay of execution. *The I., B., & W. R. W. Co. v. Ferguson*, 243
8. *Change of Venue.—Rule of Court.*—Unless a rule of court limiting the time for making application for a change of venue be made a part of the record, this court cannot on appeal notice the existence of such a rule. *Knarr v. Conaway*, 260
9. *Conflict of Testimony.*—This court will not determine the preponderance of testimony in cases of conflict thereof. *Pickens v. Hobbs et al.*, 270
10. *Assignment of Error.*—An assignment of error cannot enlarge a motion for a new trial. *Dobson v. The Duck Pond Ditching Ass'n*, 312
11. *Notice of Appeal.*—Where a part only of several defendants in a judgment appeal therefrom to the Supreme Court, without causing notice of the appeal to be given to their co-defendants in compliance with section 551 of the code, the appeal will be dismissed. *Huston v. Roosa*, 386
Keiser et al. v. Yandes, 399
Price et al. v. Pollock et al., 497
Harlan v. Watson et al., 526
12. *Interrogatories to Party.*—Where interrogatories have been filed and ordered to be answered, and afterward such order has been set aside by

- the court, the reason for setting it aside not being shown, this court will presume that the ruling was right. *Hughes v. Osborn*, 450
13. *Assignment of Error.—Reasons for New Trial.*—Where on appeal to the Supreme Court the assignment of errors includes only causes for a new trial, and fails to assign as error the overruling of a motion for a new trial, no question is presented. *Edwards v. Miller et al.*, 468
14. *Rule of Court.—Marginal Notes on Transcript.*—A failure to place marginal notes on the transcript, in compliance with rule nineteen of this court, though perhaps a ground for a motion to set aside the submission of the cause, is not a ground for dismissing the appeal. *O'Neil v. Chandler*, 471
15. *Same.*—If rule 19 of the Supreme Court, adopted on the 6th day of March, 1871 (32 Ind.), requiring marginal notes to be placed on the transcript in the appropriate places, be not complied with, the submission of the cause will be set aside. *Rhodes v. Piper*, 474
The State, ex rel. Irish, v. Klaas, 506
Etter et al. v. Armstrong et al., 475
16. *Appellant's Brief.—Rule 14.*—On an appeal to the Supreme Court, the only brief filed within sixty days after the submission of the cause was, as to the body thereof, in these words: "Appellant's Brief. We are clearly of the opinion that the judgment of the court below ought to be reversed, and therefore demand that it be done. Respectfully and seriously."
Held, that this was not a compliance with rule 14, but an evasion thereof; and, on the appellee's motion, the appeal was dismissed.
Deford v. Urbain, 476
17. *Appeal of One of Several Defendants.—Notice to Co-Parties.*—Where there are three defendants to a suit on a promissory note, of whom one is defaulted, and as to another the cause stands continued, and against the third, after an issue and trial, judgment is rendered, and from that judgment he appeals, without serving notice of the appeal on his co-defendants, the appeal is not properly taken. *Barnhart v. Cissna et al.*, 477
18. *Evidence.*—The rule that the Supreme Court will not reverse a judgment upon the weight of conflicting evidence is perhaps rendered more clearly applicable by the fact that two juries have found upon the issues in the same way. *Peacocke v. Mauck et al.*, 478
19. *Record.—Evidence.*—Where, on appeal in a criminal action, the evidence is not in the record, the Supreme Court cannot determine that it did not sustain the decision of the court. *Landaner v. The State*, 483
20. *Assignment of Error.—"On the Transcript."*—When there is no assignment of errors "on the transcript," as required by section 568, 2 G. & H. 275, the appeal will be dismissed on motion of appellee, although such assignment be made upon a detached paper among the papers in the case. *Hays et al. v. Johns*, 505
21. *Presumption in Favor of Judgment.*—The Supreme Court will presume, in favor of a judgment for the defendant, that an answer not on file, to which there is no demurrer in the transcript, contained a good defence. *Holding, Adm'r, v. Smith*, 536
22. *Transcript.—Seal.*—Where, on appeal to the Supreme Court, the transcript has not the seal of the lower court, the appeal will be dismissed. *Jones et al. v. Frost*, 543
23. *Interrogatories to Party.—Sham Pleading.*—The answers made by a party under oath to interrogatories propounded by the adverse party, under section 303 of the code, cannot be examined by the court, for the purpose of sustaining a motion to strike out, as a sham pleading, a pleading which is good on its face; nor can the Supreme Court examine such answers for the purpose of affirming such action of the lower court. *Nelson v. Cain et al.*, 563
24. *Striking Out.—Bill of Exceptions.*—Where on appeal to the Supreme

Court a pleading struck out by the lower court is not made a part of the record by bill of exceptions, it will be presumed by the appellate court that the ruling was correct. *Herrin et al. v. Olvey et al.*, 573

25. *Same.—Motion to Transfer Cause.*—Where a motion to transfer a cause from the court of common pleas to the circuit court, on the ground that the title to real estate was in issue, was overruled, and on appeal there was no bill of exceptions embodying the motion or showing the ground upon which it was decided;

Held, that the ruling on the motion could not be reviewed. *Ib.*

26. *Evidence.*—Where the evidence is not in the record, no question for review can be presented on the ground of insufficiency of the evidence or newly-discovered evidence. *Hall v. Hall*, 585

27. *Same.—Damages.*—Where there has been a recovery for a larger amount than the pleadings will authorize, a judgment may be reversed on the ground of excessive damages, though the evidence be not in the record. *Ib.*

28. *Assignment of Error.—Sufficiency of Complaint.*—In an action commenced before a justice of the peace, where a cause of action was filed, a party cannot, in the Supreme Court, assign for error that no cause of action was filed with the justice, and thereby raise a question as to the sufficiency of the cause of action. *Packard et al. v. Mendenhall*, 598

TAX.

See DELINQUENT LIST.

TEMPERANCE.

See LIQUOR LAW.

TOWN.

See SCHOOL, 1 to 6.

TRIAL.

Commencement of. See DEPOSITION, 1.

TRUST AND TRUSTEE.

1. *Resulting Trust.*—If A. receives the money of B. for B.'s use and benefit, the investment of the same in real estate by A. and his taking the deed in his own name will create a resulting trust in favor of B.

Brannon et al. v. May, 92

2. *Notice.—Recitals in a Deed.*—Where recitals in a deed of conveyance of real estate show that the grantor purchased the real estate as the agent of the grantee, and that he held the title in trust for the grantee, and that the grantee recognized and adopted the acts of the grantor as his agent, and gave his assent to the trust, and received the benefits thereof by accepting the deed of the grantor, the grantee is chargeable with any notice or knowledge possessed by the grantor affecting the title to the real estate conveyed. *Ib.*

3. *Same.—Principal and Agent.—Trustee and Beneficiary.*—Notice to an agent is notice to his principal, and notice to a trustee is notice to his beneficiary. *Ib.*

TURNPIKE.

1. *Assessment.*—Neither the board of equalization nor any court or body, except the assessors, has power to make any assessment of benefits in the construction of a turnpike.

Manford et al. v. The Pleasant Grove, etc., Co. et al., 293

2. *Same.—Injunction.—Estoppel.*—The facts that persons whose lands have been assessed, to aid in the construction of a turnpike, are stockholders in

the turnpike company, and have paid a part of their assessments, and have stood by and seen the work of constructing the road proceed, will not estop them from resisting the payment of an illegal assessment.

Pavy et al. v. The Greensburgh, etc., Turnpike Co. et al., 400

3. *Same.*—Nor will such persons be estopped, though one of them appeared before the board of equalization and presented his grievance, and the others failed to appear, though notified, and they have stood by and seen a part of the road built, the remainder of which cannot be constructed without the collection of the assessments. *Ib.*

4. *Same.*—*Board of Equalization.*—The board of equalization has no power to assess lands to aid in the construction of a turnpike, where the assessors have omitted such lands. *Ib.*

5. *Consolidation.*—The act of February 23d, 1859 (1 G. & H. 490), relating to the consolidation of turnpike companies, only authorizes the consolidation of companies theretofore organized. There is no authority by which companies since organized can be consolidated.

The Shelbyville, etc., Co. v. Barnes, 498

6. *Same.*—*Release of Stockholder.*—The consolidation of turnpike companies without the consent of the stockholders, even when authorized by statute, discharges the stockholders not consenting from the payment of subscriptions. The fact that the consolidated company bears the same name as the original company to which the subscription was made will not change this rule. *Ib.*

7. *Assessment.*—*Injunction.*—*Hopkins v. The Greensburg, Kingston and Clarksburg Turnpike Co.*, 40 Ind. 44, adhered to.

Hendricks et al. v. The Indianapolis, etc., Co., 562

VARIANCE.

See EVIDENCE, 4, 5; PROMISSORY NOTE, 7.

VENDOR AND PURCHASER.

See HUSBAND AND WIFE, 1, 2; PRACTICE, 7; STATUTE OF FRAUDS, 2; TRUST AND TRUSTEE, 1, 2, 3.

1. *Bond for Conveyance.*—*Assignment as Collateral Security.*—Where a bond for the conveyance of real estate is assigned to secure the payment of a debt, the assignee does not acquire an absolute and unconditional right to the same, or to the land. The assignment is in the nature of a mortgage.

Wilson v. Fatout et al., 52

2. *Same.*—In such case, a proceeding by the assignee to foreclose the interest of the assignor in the premises and the sale and purchase of such interest by the assignee vest in him all the interest which the assignor had in the premises, and give him the same right as if he had received an absolute and unconditional assignment of the bond. *Ib.*

3. *Same.*—*Suit Against Assignor.*—*Suit Against Maker of Bond.*—*Former Adjudication.*—Suit by such an assignee against the assignor to recover the debt, to secure which the bond was assigned, and to foreclose the interest of the assignor in the premises, to which suit the makers of the bond were made parties, such proceedings being had therein that the assignee obtained a judgment against the assignor for the amount of his debt, and a finding that the makers of the bond had been fully paid their purchase-money, and that they had no interest in the premises, and a decree was rendered for the sale of the premises and an application of the proceeds to the payment of the judgment against the assignor.

Held, that this constituted no bar to an action brought by the assignee after he became the purchaser under the decree, against the makers of the bond, for damages for a breach of the agreement to convey, or to obtain specific performance. *Ib.*

4. *Covenant Running with Land*.—The covenant of seizin will pass to the heir or assignee of the grantee. Whoever derives the right to the land through such grantee, and ultimately sustains damages in consequence of the covenantor's want of title, may sue him for damages. *Coleman v. Lyman*, 289
5. *Same*.—*Consideration*.—The defendant in such an action may show a want or failure of consideration for the deed upon which the action is brought. *Ib.*

VENDOR'S LIEN.

See HUSBAND AND WIFE, 1.

1. *Promissory Note*.—*Fordice v. Hardesty*, 36 Ind. 23, adhered to. *Hardesty et al. v. Fordice et al.*, 314
2. *Same*.—The holder of a written promise to pay money, which is shown to have been given by a purchaser of real estate for the purchase-money, has an equitable or vendor's lien on the real estate. *Shanefelter et al. v. Kenworthy*, 501

VENIRE DE NOVO.

See SPECIAL FINDING, 4.

VENUE.

See CRIMINAL LAW, 36; PRACTICE, 7, 16; SUPREME COURT, 8; WILL, 4, 5.

VERDICT.

See CRIMINAL LAW, 11; PRACTICE, 3; SPECIAL FINDING.

WAIVER.

See HIGHWAY, 1.

WASTE.

See MORTGAGE, 3.

WAY.

See HIGHWAY.

1. A way is an incorporeal hereditament, and consists in the right of passing over another's ground. It may arise from grant, prescription, or necessity, and is either in gross, that is, attached to the person using it, or appurtenant, or annexed to and passing with a conveyance of the estate. A way is never construed to be in gross when it can fairly be construed to be appurtenant. *Sanxay v. Hunger*, 44
2. *Same*.—*When a Way is Appurtenant*.—A way is appurtenant when it is incident to an estate, one terminus being on the land of another, inheres in the land, concerns the premises, and is essentially necessary to their enjoyment. It is in the nature of a covenant running with the land, and must respect the thing granted, and concern the land or estate conveyed. *Ib.*
3. *Same*.—*Right of Way Ascertained and Established*.—Where there is no record evidence of a right of way, and the owner of the real estate over which the way is claimed denies its existence and is threatening to interrupt the use and enjoyment of the way, and has placed upon record a notice that he disputes such right, the person claiming such way may, by an action, have his right ascertained and the way established, while those who are acquainted with the facts are alive. *Ib.*

WIDOW.

See DESCENT.

WILL.

1. *Contest of Will.—Affidavit.*—The proceeding to contest a will is statutory; and the statute (2 G. & H. 559, sec. 39) providing that any person may "contest," etc., "by filing in the proper court his allegation in writing, verified by his affidavit setting forth," etc., is complied with when the complaint has been sworn to by any one or more of the plaintiffs.
Willett et al. v. Porter et al., 250
2. *Same.—Unsound Mind.*—In a proceeding to contest a will, the general allegation that the testator was of unsound mind includes every species of unsoundness of mind. *Ib.*
3. *Same.—Undue Execution.*—In such a proceeding, the allegation that the will was unduly executed includes duress, fraud, and whatever else goes to show undue execution. *Ib.*
4. *Jurisdiction.—Circuit Court.—Court of Common Pleas.—Change of Venue.*—A proceeding to contest a will is required to be commenced in the court of common pleas, but the transfer of the same from the common pleas to the circuit court may be presumed to be governed by the statute providing for change of venue to the circuit court. *Ib.*
5. *Same.*—The parties to such a proceeding in the court of common pleas, having agreed of record that the proceeding should be transferred to the circuit court, which had jurisdiction of the subject-matter, and in the latter court having appeared and gone to trial without objection, could not afterward object that the transfer had been erroneously granted. *Ib.*
6. *Evidence.*—In a proceeding to contest a will on the ground of the unsoundness of mind of the testator and the undue execution of the will, evidence of the amount of property the widow owned when she married the testator was held inadmissible. *Ib.*
7. *Same.*—In such a proceeding, evidence is inadmissible, that the widow in the lifetime of the testator, after the will was made, filed a petition for divorce from the testator, then her husband, which was pending at the time of his death. *Ib.*
8. *Residuary Legatees.—Lapsed and Adeemed Legacy.*—Where five daughters were residuary legatees of the personal estate of their father, and one of them died, and three of the others gave receipts to their father for a sum of money in full of all their interest in the estate; the remaining daughter, the one legacy having lapsed and the three others having been thus adeemed in the lifetime of the testator, was entitled to the residue of the personal estate.
Gray et al. v. Bailey et al., 349
9. *Posthumous Child.—Revocation of Will.—Jurisdiction of Court of Common Pleas.*—In a proceeding in the court of common pleas to have a will declared revoked by the birth of a posthumous child, for whom no provision had been made, no question as to the jurisdiction of the court could be made on the ground that the title to real estate might be affected thereby.
Morse et al. v. Morse, 365
10. *Same.—Party Plaintiff.*—Such an action may be brought by the posthumous child, or by any one interested, although there be others having a common interest who are not joined. *Ib.*
11. *Same.—Descent.*—The birth of such a child, without provision for it in the will, revokes the will; and while such a child lives, the will is to be deemed revoked, and the property of the decedent must descend according to our statute of descents applicable to cases of intestacy. *Ib.*

WITNESS.

See CONTINUANCE, 1, 2.

1. *Credibility.—Conviction of Infamous Crime.*—Every person who, after the adoption of section 79, p. 999 of the Revised Statutes of 1843, was duly convicted of the crime of treason, murder, rape, arson, burglary, robbery,

manstealing, forgery, or wilful and corrupt perjury, was incapable of giving evidence in a court of justice, prior to the adoption of section 243 of the present code; since the adoption of said section 243, such conviction may be shown to affect the credibility of a witness. *Glenn v. Clore*, 60

2. *Same.*—It is error to permit the introduction in evidence of a record showing an indictment for an assault and battery with intent to commit a rape, and showing an acquittal of the intent and a conviction for a simple assault and battery, for the purpose of affecting the credibility of a witness. *Ib.*
3. *Assignor.—Claim Against an Estate.*—Where one sues as assignee upon an account, or upon a note equitably assigned, and makes the assignor a party to answer as to his interest, the assignor and assignee are not adverse parties; their interests are identical; and where the cause of action is filed as a claim against an estate, the assignor cannot testify as a witness for the assignee. *Ketcham, Adm'x, v. Hill*, 64

END OF VOLUME XLII.

J. B. B.

